FEDERAL REGISTER

Vol. 87 Thursday
No. 37 February 24, 2022

Pages 10297–10686

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 87 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**
FEDERAL AGENCIES	
Subscriptions:	
Assistance with Federal agency subscriptions:	
Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

Separate Parts In This Issue

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

Bulletin 2022–02: Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: The Electronic Fund Transfer Act (EFTA) provides, among other things, that no person may require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of receipt of a government benefit. The Bureau of Consumer Financial Protection (Bureau) is issuing this Compliance Bulletin to reiterate that this prohibition in EFTA applies to government benefit accounts.

DATES: This bulletin is applicable on February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Eliott C. Ponte, Counsel, or Kristine M. Andreassen, Senior Counsel, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

Section 913 of EFTA provides, among other things, that no person may require a consumer to establish an account for receipt of electronic fund transfers (EFTs) with a particular financial institution as a condition of employment or receipt of a government benefit.[1] This provision, often referred to as the compulsory use prohibition, is implemented in § 1005.10(e)(2) of Regulation E. The Bureau is issuing this Compliance Bulletin to reiterate that the compulsory use prohibition in EFTA applies to government benefit accounts.

A. Background

Congress enacted EFTA in 1978 with the purpose of ''provid[ing] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.'' [2] EFTA's primary objective is ''the provision of individual consumer rights.'' [3] Congress also empowered the Board of Governors of the Federal Reserve System (Board) to promulgate regulations implementing EFTA. With the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), authority to implement most of EFTA transferred to the Bureau.[4]

The regulations first promulgated by the Board to implement EFTA now reside in subpart A of Regulation E.[5] These rules provide a broad suite of protections to consumers who make EFTs, and for accounts from which consumers can make EFTs. An EFT is any transfer of funds initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account.[6] In its initial rulemaking to implement EFTA, the Board developed a broad definition of ''account,'' which closely mirrored the definition of ''account'' in EFTA.[7] The definition provides that, subject to certain specific exceptions, an account is a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.[8]

In 1994, the Board amended Regulation E to extend Regulation E's protections to accounts used for the electronic distribution of government benefits (1994 EBT Rule).[9] After the Board finalized the 1994 EBT Rule, Congress amended EFTA to exempt ''needs-tested'' State and local electronic benefit transfer (EBT) programs.[10] The Board subsequently adopted a rule exempting EBT programs established or administered by State or local government agencies from Regulation E. However, all accounts used to distribute benefits for federally administered programs (including Federal needs-tested programs) as well as non-needs tested State and local government benefit programs remained covered by Regulation E.[11]

On October 5, 2016, the Bureau issued a final rule titled ''Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)'' (2016 Final Rule).[12] The 2016 Final Rule, as subsequently amended,[13] is referred to herein as the Prepaid Accounts Rule. The Prepaid Accounts Rule, among other things, extended Regulation E coverage to prepaid accounts and adopted provisions specific to such accounts. The definition of ''prepaid account'' in the Prepaid Accounts Rule includes government benefit accounts (as defined in § 1005.15(a)(2)), which were already covered by Regulation E since the mid-1990s. The Prepaid Accounts Rule generally maintained the existing provisions specific to government benefit accounts, while adding certain new requirements such as pre-acquisition disclosures. The Prepaid Accounts Rule did not change the compulsory use prohibition in § 1005.10(e) of Regulation E, but did add commentary to clarify the compulsory use prohibition's application to government benefits (comment 10(e)(2)–2), which is in line with pre-existing commentary regarding payroll card accounts (comment 10(e)(2)–1).

B. Compulsory Use Prohibition

As mentioned above, the compulsory use prohibition of EFTA, as implemented by Regulation E, provides that no person may require a consumer

[1] 15 U.S.C. 1693k.

[2] Public Law 95–630, 92 Stat. 3728 (1978).

[3] 15 U.S.C. 1693b.

[4] Public Law 111–203, tit. X, section 1084, 124 Stat. 1376, 2081 (2010) (codified at 15 U.S.C. 1693a *et seq.*). *See also* Dodd-Frank Act section 1061(b), 124 Stat. 2036 (codified at 12 U.S.C. 5581(b)).

[5] These provisions were originally adopted as 12 CFR part 205 but, upon transfer of authority in the Dodd-Frank Act to implement Regulation E to the Bureau, were renumbered as 12 CFR part 1005. 76 FR 81020 (Dec. 27, 2011).

[6] 12 CFR 1005.3(b)(1).

[7] 44 FR 18468, 18480 (Mar. 28, 1979).

[8] 12 CFR 1005.2(b)(1).

[9] 59 FR 10678 (Mar. 7, 1994).

[10] Public Law 104–193, 110 Stat. 2105 (1996).

[11] 62 FR 43467 (Aug. 14, 1997).

[12] 81 FR 83934 (Nov. 22, 2016).

[13] *See* 82 FR 18975 (Apr. 25, 2017) and 83 FR 6364 (Feb. 13, 2018). These amendments, among other things, extended the effective date of the Prepaid Accounts Rule to April 1, 2019.

to establish an account for receipt of EFT with a particular financial institution as a condition of receipt of a government benefit.[14] Person, for the purposes of Regulation E and the compulsory use prohibition, means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.[15] The compulsory use prohibition applies to all persons, not just financial institutions as defined in Regulation E.[16] The compulsory use prohibition applies to ''government benefit accounts,'' which is defined as an account established by a government agency for distributing government benefits to a consumer electronically. However, for purposes of Regulation E, including the compulsory use prohibition, a government benefit account does not include an account for distributing needs-tested benefits in a program established under State or local law or administered by a State or local agency.[17]

The term ''needs-tested'' is not defined in EFTA or Regulation E. In the preamble to its 2016 Final Rule, the Bureau identified examples of needs-tested government benefit programs that *are not* ''government benefit accounts'' subject to the compulsory use prohibition, such as those used to distribute funds related to Temporary Assistance for Needy Families (TANF), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the Supplemental Nutrition Assistance Program (SNAP).[18] Accounts established under programs administered by State or local agencies for benefits that are not needs-tested *are* ''government benefit accounts'' subject to the compulsory use prohibition. Examples of government benefit accounts administered by State or local agencies that are subject to the compulsory use prohibition because they are not needs-tested include accounts used to distribute unemployment insurance, child support, certain prison and jail ''gate money'' benefits, and pension plan payments.[19]

In addition, all accounts used to distribute funds under federally administered benefits programs (even if those benefits are needs-tested) are ''government benefit accounts'' subject to the compulsory use prohibition; for example, accounts used to distribute Social Security, Social Security Disability Insurance, and Supplemental Security Income (SSI) payments; or Federal tax credits like the Earned Income Tax Credit (EITC) or the Child Tax Credit (CTC) are subject to the compulsory use prohibition.[20]

The compulsory use prohibition ensures that consumers receiving the government benefits described above have a choice with respect to how they receive their funds. Government agencies, financial institutions, and other persons have several options available to them to ensure consumers are provided a choice.[21] For example, a government agency that requires consumers to receive benefits through direct deposit will not violate the compulsory use prohibition if it allows consumers to choose the financial institution they want to use in receiving the direct deposit.[22] Alternatively, a government agency may give a consumer the choice of having their benefits deposited at a particular institution (designated by the government agency) so long as the consumer is able to receive their benefits by another means.[23]

As the Bureau explained in the 2016 Final Rule, the Bureau believes that consumers are not provided a choice when a consumer is required to receive the *first* payment of government benefits on a prepaid card (or otherwise at a particular institution), even if the consumer can later re-direct the payment to an account of their choice.[24] In such a scenario, the consumer does not have a choice with respect to how to receive the first payment of the government benefit; rather, with respect to that first payment, the consumer was required to establish an account with the financial institution that issued the prepaid card as a condition of receiving the funds.[25]

In addition to having a choice with respect to how consumers receive their government benefits, Regulation E requires that a statement of the consumer's payment options be included in disclosures provided before a consumer acquires a government benefit account. Specifically, that statement must disclose that (1) the consumer has several options to receive benefit payments, followed by a list of the options available to the consumer, and a statement directing the consumer to tell the agency which option the consumer chooses; or (2) the consumer does not have to accept the government benefit account and directing the consumer to ask about other ways to receive government benefit payments.[26] As discussed more below, government benefit accounts are entitled to additional protections and disclosures under Regulation E.

C. Additional Regulation E Protections for Government Benefit Accounts

As mentioned above, government benefit accounts are entitled to the protections of EFTA generally, and Regulation E's provisions applicable to prepaid accounts specifically. The protections in Regulation E for consumers who receive government benefits include the following:

- Disclosures. Under Regulation E, consumers are entitled to three types of disclosures for government benefit accounts: Pre-acquisition disclosures, disclosures on the access device or entry point, and initial disclosures.

Pre-acquisition disclosures for a government benefit account must set forth key information about the account that includes, as mentioned above, a statement regarding the consumer's payment options.[27] A government agency must provide the consumer with pre-acquisition disclosures before the consumer acquires a government benefit account.[28]

Disclosures on the access device or entry point for a government benefit account must contain the name of the financial institution that directly holds the account or issues the access device as well as a website and phone number that the consumer can use to contact that financial institution about the

[14] 12 CFR 1005.10(e).

[15] 12 CFR 1005.2(j).

[16] 12 CFR 1005.3(a).

[17] 12 CFR 1005.15(a)(2).

[18] *See* 81 FR 83934, 83942 (Nov. 22, 2016). While these accounts do not constitute ''government benefit accounts'' as defined in § 1005.15(a)(2), the Bureau notes that they may still be ''prepaid accounts'' under one of the other prongs of that definition in § 1005.2(b)(3). To the extent that they are prepaid accounts, the requirements of the Prepaid Accounts Rule apply.

[19] *See* 81 FR 83934, 83995 (Nov. 22, 2016); *In re JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021), *www.consumerfinance.gov/enforcement/actions/jpay-llc/.*

[20] *See id.* at 83995, 84320.

[21] In 2013, the Bureau issued a Compliance Bulletin on Payroll Card Accounts (Payroll Card Bulletin) to, among other things, reiterate that the compulsory use provision of EFTA and Regulation E prohibits employers, financial institutions, and other persons from mandating that employees receive wages only on a payroll card at a particular institution. As explained in the Payroll Card Bulletin, payroll card accounts are accounts that are established directly or indirectly through an employer, and to which transfers of the consumer's salary, wages, or other employee compensation are made on a recurring basis. *See CFPB Bulletin 2013–10* (Sept. 12, 2013), *www.consumerfinance.gov/compliance/supervisory-guidance/bulletin-payroll-card-accounts/.*

[22] 12 CFR 1005.10(e)(2) and comment 10(e)(2)–2.

[23] *See id.*

[24] 81 FR 83934, 83985 (Nov. 22, 2016).

[25] *Id.*

[26] 12 CFR 1005.15(c)(2)(i).

[27] 12 CFR 1005.15(c)(2).

[28] 12 CFR 1005.15(c)(1).

government benefit account.[29] These disclosures must be included on the access device or, if there is no physical access device, on a website, mobile application, or other entry point a consumer must visit to access the government benefit account electronically.[30]

Initial disclosures must set forth comprehensive fee information that may be imposed in connection with the account as well as the information required to be included in the initial disclosures for other accounts subject to Regulation E, which include, among other things, disclosures regarding a consumer's liability for unauthorized EFTs, an error resolution notice, contact information for the financial institution providing the account, the types of transfers a consumer may make and any limitations on the frequency and dollar amount of transfers, and the fees associated with making.[31] Initial disclosures must be made at account opening or before the first EFT occurs.[32]

• Change-in-Terms Notices. Change-in-terms notices are required when a term or condition required to be disclosed in the initial disclosures changes or the change results in an increased fee, increased liability for the consumer, fewer types of available EFTs, or stricter limitations on the frequency or dollar amount of EFTs.[33]

• Access to Account History. Government agencies must either provide a periodic statement as required by Regulation E generally, or must make available to the consumer (1) the consumer's account balance, by telephone; (2) an electronic history, such as through an website, of the consumer's account transactions covering at least 12 months preceding the date the consumer electronically accesses the account; and (3) written account transaction histories provided upon request must cover at least the 24 months preceding the date on which the government agency receives the consumer's request for the account transaction history.[34]

• Limited Liability for Unauthorized Transfers and Error Resolution Rights. With limited modifications regarding the period within which an unauthorized transfer must be reported, Regulation E's limited liability protections and error resolution rights fully apply to government benefit accounts.

II. Conclusion

The Bureau is issuing this Compliance Bulletin to reiterate that the compulsory use prohibition in EFTA applies to government benefit accounts, as defined in Regulation E. The Bureau notes that it is authorized, subject to certain exceptions, to enforce EFTA and Regulation E against any person subject to EFTA and Regulation E, including financial institutions.[35] In addition, subject to certain exceptions, the Bureau has enforcement authority over covered persons offering or providing certain consumer financial products or services—including government benefit accounts—under the Consumer Financial Protection Act of 2010.[36]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–03587 Filed 2–23–22; 8:45 am]

BILLING CODE 4810–AM–P

[29] 12 CFR 1005.15(f), 1005.18(f).

[30] 12 CFR 1005.15(f), 1005.18(f)(3).

[31] 12 CFR 1005.15(e)(1) and (f), 1005.18(h)(2)(ii)(A) and (iv). *See generally* 12 CFR 1005.7(b).

[32] 12 CFR 1005.7(a).

[33] 12 CFR 1005.8(a)(1); 1005.15(f); 1005.18(f), (h)(2)(ii)(A), (iii), and (iv).

[34] 12 CFR 1005.9(b); 1005.15(d)(1); and 1005.18(h)(3)(i).

[35] 15 U.S.C. 1693o(a)(5).

[36] Public Law 111–203, tit. X, 124 Stat. 1955 (2010) (12 U.S.C. 5561 through 5567).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2020–1086]

Airworthiness Criteria: Special Class Airworthiness Criteria for the Amazon.com Services LLC MK27–2 Unmanned Aircraft; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Issuance of final airworthiness criteria; correction.

SUMMARY: The FAA published a document in the **Federal Register** on January 27, 2022, announcing the special class airworthiness criteria for the Amazon.com Services LLC Model MK27–2 unmanned aircraft. The document contained incorrect references to the applicant's name.

DATES: This correction is effective on February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher J. Richards, Emerging Aircraft Strategic Policy Section, AIR–618, Strategic Policy Management Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 6020 28th Avenue South, Room 103, Minneapolis, MN 55450, telephone (612) 253–4559.

SUPPLEMENTARY INFORMATION:

Background

On January 21, 2022, the FAA issued final airworthiness criteria for the Amazon.com Services LLC Model MK27–2 unmanned aircraft, which published in the **Federal Register** on January 27, 2022 (87 FR 4128). The original application identified the applicant name as Amazon Logistics, Inc. On November 19, 2020, Amazon Logistics, Inc., amended its application to change its applicant name to ''Amazon.com Services LLC.'' As published, the document incorrectly referred to the original applicant name.

Correction

In the **Federal Register** of January 27, 2022 (87 FR 4128), make the following corrections:

1. On page 4128, in the first column, correct the subject heading to read ''Airworthiness Criteria: Special Class Airworthiness Criteria for the Amazon.com Services LLC MK27–2 Unmanned Aircraft''

2. On page 4128, in the first column, in the **SUMMARY** section, line 3, correct ''Amazon Logistics, Inc.'' to read ''Amazon.com Services LLC''.

3. On page 4128, in the second column, in the **SUPPLEMENTARY INFORMATION** section, line 1, correct ''Amazon Logistics, Inc.'' to read ''Amazon.com Services LLC''.

Issued in Washington, DC, on February 15, 2022.

Ian Lucas,

Manager, Policy Implementation Section, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2022–03778 Filed 2–23–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0142; Project Identifier AD–2022–00071–T; Amendment 39–21955; AD 2022–05–04]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 737–100, –200, –200C, –300, –400, –500, –600, –700,

–700C, –800, –900, and –900ER series airplanes, except for Model 737–200 and –200C series airplanes equipped with a certain flight control system. This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a recent determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged, which could result in reduced ability of the flightcrew to maintain safe flight and landing of the airplane. This AD requires revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate specific operating procedures for instrument landing system (ILS) approaches, speedbrake deployment, go-arounds, and missed approaches, when in the presence of 5G C-Band interference as identified by Notices to Air Missions (NOTAMs). The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 24, 2022.

The FAA must receive comments on this AD by April 11, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0142; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for the Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: For Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, contact Jeffrey W. Palmer, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5351; email: *jeffrey.w.palmer@faa.gov.* For Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, contact Dean Thompson, Senior Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3165; email: *dean.r.thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

In March 2020, the United States Federal Communications Commission (FCC) adopted final rules authorizing flexible use of the 3.7–3.98 GHz band for next generation services, including 5G and other advanced spectrum-based services.[1] Pursuant to these rules, C-Band wireless broadband deployment was permitted to occur in phases with the opportunity for operations in the lower 0.1 GHz of the band (3.7–3.8 GHz) in certain markets beginning on January 19, 2022. This AD refers to ''5G C-Band'' interference, but wireless broadband technologies, other than 5G, may use the same frequency band.[2] These other uses of the same frequency band are within the scope of this AD since they would introduce the same risk of radio altimeter interference as 5G C-Band.

The radio altimeter is an important aircraft instrument, and its intended function is to provide direct height-above-terrain/water information to a variety of aircraft systems. Commercial aviation radio altimeters operate in the 4.2–4.4 GHz band, which is separated by 0.22 GHz from the C-Band telecommunication systems in the 3.7–3.98 GHz band. The radio altimeter is more precise than a barometric altimeter and for that reason is used where aircraft height over the ground needs to be precisely measured, such as autoland, manual landings, or other low altitude operations. The receiver on the radio altimeter is typically highly accurate, however it may deliver erroneous results in the presence of out-of-band radio frequency emissions from other frequency bands. The radio altimeter must detect faint signals reflected off the ground to measure altitude, in a manner similar to radar. Out-of-band signals could significantly degrade radio altimeter functions during critical phases of flight, if the altimeter is unable to sufficiently reject those signals.

The FAA issued AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) (AD 2021–23–12) to address the effect of 5G C-Band interference on all transport and commuter category airplanes equipped with a radio (also known as radar) altimeter. AD 2021–23–12 requires revising the limitations section of the existing AFM to incorporate limitations prohibiting certain operations, which require radio altimeter data to land in low visibility conditions, when in the presence of 5G C-Band interference as identified by NOTAM. The FAA issued AD 2021–23–12 because radio altimeter anomalies that are undetected by the automation or pilot, particularly close to the ground (*e.g.,* landing flare), could lead to loss of continued safe flight and landing.

Since the FAA issued AD 2021–23–12, Boeing has continued to evaluate potential 5G C-Band interference on aircraft systems that rely on radio altimeter inputs. Boeing issued Boeing Multi Operator Message MOM–MOM–22–0041–01B(R1), dated February 1, 2022; Boeing Multi Operator Message MOM–MOM–22–0017–01B(R2), dated February 1, 2022; Boeing Flight Crew Operations Manual Bulletin TBCN–28, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated January 17, 2022; Boeing Flight Crew Operations Manual Bulletin TBC–30 R1, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated February 4, 2022; Boeing Flight Crew Operations Manual Bulletin TBCE–32 R1, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated February 4, 2022; and Boeing Flight Crew Operations Manual Bulletin TBC 117 R1, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated February 4, 2022; for Model 737–200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes.

Based on Boeing's data, the FAA identified an additional hazard presented by 5G C-Band interference on The Boeing Company Model 737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes, except for Model 737–200 and –200C series airplanes equipped with an SP–77 flight control system. The SP–77 flight control system

[1] The FCC's rules did not make C-Band wireless broadband available in Alaska, Hawaii, and the U.S. Territories.

[2] The regulatory text of the AD uses the term ''5G C-Band'' which, for purposes of this AD, has the same meaning as ''5G'', ''C-Band'' and ''3.7–3.98 GHz.''

did not include autoland or flare mode, which, as described below, are affected by 5G C-Band interference. The FAA determined anomalies due to 5G C-Band interference may affect multiple other airplane systems using radio altimeter data, regardless of the approach type or weather. These anomalies may not be evident until very low altitudes. Impacted systems include, but are not limited to, autopilot flight director system; autothrottle system; flight controls; flight instruments; traffic alert and collision avoidance system (TCAS); ground proximity warning system (GPWS); and configuration warnings.

The effects on these impacted systems include:

- *Autopilot Flight Director System:* NO AUTOLAND autopilot status annunciation may be shown; autopilot may not engage; autopilot disconnect may occur during ILS/GLS approaches; the flight directors may provide erroneous guidance during ILS approaches; runway alignment may not occur or may activate earlier or later than expected; flare may not occur; FLARE mode can be erroneously annunciated on the FMA (flight mode annunciation); or go-around mode may not be available.
- *Autothrottle System:* Autothrottle can remain in SPD (speed) mode and may advance to maintain speed during flare instead of retard to IDLE; or autothrottle may retard to idle prematurely in the flare.
- *Flight Controls:* Automatic speedbrake deployment may not occur after touchdown (for Model –600, –700, –700C, –800, –900, and –900ER series airplanes); or SPEEDBRAKES EXT or SPEED BRAKE Caution message may not be available or may illuminate erroneously.
- *Flight Instruments:* The radio altimeter indication may not be shown; the RADIO minimums indications (flashing or turning amber) may not be shown or may be erroneous; the rising runway symbol may not be shown; the localizer deviation alert amber scale and flashing pointer may not be shown (deviation indications are still available); or the glideslope deviation alert amber scale and flashing pointer may not be shown (deviation indications are still available).
- *TCAS:* TCAS alerts may not be available (TCAS alerts that do occur will be valid); or TCAS inhibits for resolution advisories may be erroneous.
- *GPWS:* GPWS alerts may not be available or may be erroneous (although look-ahead terrain alerting remains available); radio altimeter-based altitude and minimums aural callouts during approach may not be available or erroneous; or windshear detection systems (predictive and reactive) may be inoperative.
- *Configuration Warnings:* Erroneous illumination of the red landing gear indicator lights may occur; erroneous steady landing gear warning horn may occur; or radio altitude based alerts may not be available or may be erroneous.
- *Considerations for Dispatch:* For Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, adjust operational (time of arrival) landing distance for manual speedbrakes. For Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, no impacts on dispatch landing performance calculations.
- Other simultaneous flight deck effects associated with the 5G C-Band interference could increase pilot workload.

These effects may cause erroneous indications and annunciations, as well as conflicting information, to be provided to the flightcrew during a critical phase of flight. There may also be a lack of cues present to elicit prompt go-around or recovery initiation. These effects could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane and is an unsafe condition. Thus, the FAA has determined that prompt identification of a potential problem and initiation of a go-around are required to ensure the capability for continued safe flight and landing.

To address this unsafe condition, this AD mandates procedures for operators to incorporate specific operating procedures for landing distance calculations, ILS (and GLS if installed) approaches, speedbrake deployment, go-arounds, and missed approaches, when in the presence of 5G C-Band interference as identified by NOTAMs. The operating procedures mandated by this AD require the flightcrew to execute a go-around if they encounter certain conditions during ILS approaches, and prohibit them from using certain affected systems during the go-around until reaching a safe altitude.

Finally, the FAA notes that AD 2021–23–12 remains in effect and thus prohibits certain ILS approaches. Thus, this AD addresses procedures applicable only to those ILS approaches not prohibited by AD 2021–23–12.

The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires revising the limitations and operating procedures sections of the existing AFM to incorporate specific operating procedures for ILS and GLS (if installed) approaches, speedbrake deployment, go-arounds, and missed approaches, when in the presence of 5G C-Band interference as identified by NOTAMs.

Compliance With AFM Revisions

Section 91.9 prohibits any person from operating a civil aircraft without complying with the operating limitations specified in the AFM. FAA regulations also require operators to furnish pilots with any changes to the AFM (14 CFR 121.137) and pilots in command to be familiar with the AFM (14 CFR 91.505).

Interim Action

The FAA considers this AD to be an interim action. If final action is later identified, the FAA might consider further rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because the FAA determined that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band, and a determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. This increased flightcrew workload could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane. The urgency is based on the hazard presented by 5G C-Band interference, and on C-Band wireless broadband deployment, which began in phases with operations on January 19, 2022. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include Docket No. FAA–2022–0142 and Project Identifier AD–2022–00071–T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI for Model 737–100, –200, –200C, –300, –400, and –500 series airplanes should be sent to Jeffrey W. Palmer, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5351; email: *jeffrey.w.palmer@faa.gov.* Submissions containing CBI for Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes should be sent to Dean Thompson, Senior Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3165; email: *dean.r.thompson@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 2,442 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision	1 work-hour × $85 per hour = $85	$0	$85	$207,570

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2022–05–04 The Boeing Company: Amendment 39–21955; Docket No. FAA–2022–0142; Project Identifier AD–2022–00071–T.

(a) Effective Date

This airworthiness directive (AD) is effective February 24, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, except for Model 737–200 and –200C series airplanes equipped with an SP–77 flight control system.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. The FAA is issuing this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Airplane Flight Manual (AFM) Revision

(1) Within 2 days after the effective date of this AD: Revise the Limitations Section of the existing AFM to include the information specified in figure 1 to paragraph (g)(1) of this AD. This may be done by inserting a copy of figure 1 to paragraph (g)(1) of this AD into the Limitations Section of the existing AFM.

BILLING CODE 4910–13–P

Figure 1 to paragraph (g)(1) – *AFM Limitations Revision*

(Required by AD 2022-05-04)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around
The following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Approach, Landing, and Go-Around
Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(2) Within 2 days after the effective date of this AD: Revise the Operating Procedures Section of the existing AFM to include the information specified in figure 2 to paragraph (g)(2) of this AD or figure 3 to paragraph (g)(2) of this AD, as applicable. This may be done by inserting a copy of figure 2 to paragraph (g)(2) of this AD or figure 3 to paragraph (g)(2) of this AD, as applicable, into the Operating Procedures Section of the existing AFM.

Figure 2 to paragraph (g)(2) – ***AFM Operating Procedures Revision for Model 737-100, -200, -200C, -300, -400, and -500 series airplanes***

(Required by AD 2022-05-04)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches
For ILS approaches not prohibited by AD 2021-23-12, during any ILS approach with autopilot engaged or flight director ON, execute a go-around for any of the following conditions, unless the runway environment is in sight and a manual, visual landing can be accomplished:

- If the flight directors automatically retract from view, or
- If the pitch guidance indicates FLARE mode prematurely, or
- If the autothrottle retards to IDLE prematurely.

During Go-Around and Missed Approach
If go-around is required, ensure thrust is increased to go-around power. Do not use flight director, autopilot, or autothrottles until reaching a safe altitude. TOGA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

Figure 3 to paragraph (g)(2) – ***AFM Operating Procedures Revision for Model 737-600, -700, -700C, -800, -900, and -900ER series airplanes***

(Required by AD 2022-05-04)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches
For ILS approaches not prohibited by AD 2021-23-12, during any ILS (and GLS if installed) approach with autopilot engaged or flight director ON, execute a go-around for any of the following conditions, unless the runway environment is in sight and a manual, visual landing can be accomplished:

- If the flight directors automatically retract from view, or
- If the pitch guidance indicates FLARE mode prematurely, or
- If the autothrottle retards to IDLE prematurely.

Landing
Adjust operational (time of arrival) landing distance for manual speedbrakes. Automatic speedbrake deployment may not occur after touchdown.

During Go-Around and Missed Approach
If go-around is required, ensure thrust is increased to go-around power. Do not use flight director, autopilot, or autothrottles until reaching a safe altitude. TOGA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

Note 1 to paragraph (g)(2): Guidance for accomplishing the actions required by paragraph (g)(2) of this AD can be found in Boeing Multi Operator Message MOM–MOM–22–0041–01B(R1), dated February 1, 2022; Boeing Multi Operator Message MOM–MOM–22–0017–01B(R2), dated February 1, 2022; Boeing Flight Crew Operations Manual Bulletin TBCN–28, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated January 17, 2022; Boeing Flight Crew Operations Manual Bulletin TBC–30 R1, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated February 4, 2022; Boeing Flight Crew Operations Manual Bulletin TBCE–32 R1, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated February 4, 2022; and Boeing Flight Crew Operations Manual Bulletin TBC–117 R1, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated February 4, 2022.

(h) Alternative Methods of Compliance (AMOCs)

(1) For Model 737–100, –200, –200C, –300, –400, and –500 series airplanes: The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-Requests@faa.gov.* For Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes: The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(2) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) providing relief for specific radio altimeter installations are approved as AMOCs for the provisions of this AD.

(i) Related Information

(1) For more information about this AD for Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, contact Jeffrey W. Palmer, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5351; email: *jeffrey.w.palmer@faa.gov.*

(2) For more information about this AD for Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, contact Dean Thompson, Senior Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3165; email: *dean.r.thompson@faa.gov.*

(3) For service information identified in this AD that is not incorporated by reference, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110 SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.*

(j) Material Incorporated by Reference

None.

Issued on February 16, 2022.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2022–03967 Filed 2–22–22; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 1

[RIN 2125–AG04]

Diversion of Highway Revenues; Removal of Obsolete Regulation

Correction

In rule document 2022–03173 appearing on pages 8411–8413 in the issue of Tuesday, February 15, 2022, make the following change. On page 8413, in column 1, in lines 15–20, the words of issuance and regulatory instructions should read as follows (which removes 23 § CFR 1.28 instead of 23 CFR part 1):

In consideration of the foregoing, FHWA amends 23 CFR part 1 as follows:

PART 1—GENERAL

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 23 U.S.C. 315, 49 CFR 1.48(b).

§ 1.28 [Removed and Reserved]

■ 2. Section 1.28 is removed and reserved.

[FR Doc. C1–2022–03173 Filed 2–23–22; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9960]

RIN 1545–BP79

Guidance Under Section 958 on Determining Stock Ownership; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations; correction.

SUMMARY: This document contains corrections to the final regulations (Treasury Decision 9960), published in the **Federal Register** on Tuesday, January 25, 2022. The final regulations regarding the treatment of domestic partnerships for purposes of determining amounts included in the gross income of their partners with respect to foreign corporations.

DATES: These corrections are effective on February 24, 2022, and applicable on or after January 25, 2022.

FOR FURTHER INFORMATION CONTACT: Edward J. Tracy at (202) 317–6934 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9960) subject to this correction are issued under section 951 of the Internal Revenue Code.

Need for Correction

As published, the final regulations (TD 9960), contain errors that need to be corrected.

Correction of Publication

Accordingly, the final regulation (TD 9960), that are the subject of FR Doc. 2022–00066, published on January 25, 2022 (87 FR 3648), are corrected to read as follows:

On page 3652, the third column, the thirty-second line through the forty-third line from the top of the first full paragraph is corrected to read ''year ending December 31, 2023. Accordingly, for their taxable year ending December 31, 2023, the U.S. shareholder partners would have a distributive share of the partnership's section 951 inclusion for the CFC's taxable year ending December 31, 2022 (for the U.S. shareholder partnership's taxable year ending June 30, 2023) and would also have a direct section 951 inclusion for the CFC's taxable year ending December 31, 2023.''

Oluwafunmilayo A. Taylor,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2022–03612 Filed 2–23–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

30 CFR Part 250

[Docket ID: BSEE–2022–0002; 223E1700D2 EEEE500000 ET1SF0000.EAQ000]

RIN 1014–AA55

Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Civil Penalty Inflation Adjustment

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Final rule.

SUMMARY: This final rule adjusts the level of the maximum daily civil monetary penalty contained in the Bureau of Safety and Environmental Enforcement (BSEE) regulations for violations of the Outer Continental Shelf Lands Act (OCSLA), in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Office of Management and Budget (OMB) guidance. The civil penalty inflation adjustment, using a 1.06222 multiplier, accounts for one year of inflation based on the Consumer Price Index (CPI) spanning from October 2020 to October 2021.

DATES: This rule is effective on February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Janine Marie Tobias, Safety and Enforcement Division, Bureau of Safety and Environmental Enforcement, (202) 208–4657 or by email: *regs@bsee.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Legal Authority

The OCSLA, at 43 U.S.C. 1350(b)(1), directs the Secretary of the Interior (Secretary) to adjust the OCSLA maximum daily civil penalty amount at least once every three years to reflect any increase in the CPI to account for inflation. On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114–74) (FCPIA of 2015). The FCPIA of 2015 required Federal agencies to adjust the level of civil monetary penalties found in their regulations with an initial ''catch-up'' adjustment through rulemaking, if warranted, and then to make subsequent annual adjustments for inflation. The purpose of these adjustments is to maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. Agencies were required to publish the first annual inflation adjustments in the **Federal Register** by no later than January 15, 2017, and must publish recurring annual inflation adjustments by no later than January 15 of each subsequent year.

BSEE last updated the maximum daily civil penalty amounts in BSEE's regulations for OCSLA violations by a final rule published and effective on May 4, 2021. (*See* 86 FR 23606). Consistent with OMB guidance, the 2021 final rule implemented the inflation adjustments required by the FCPIA of 2015 through October 2020.

The OMB Memorandum M–22–07 (*Implementation of Penalty Inflation Adjustments for 2022, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015;* available at *https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-07.pdf*) explains agency responsibilities for: Identifying applicable penalties and performing the annual adjustment; publishing revisions to regulations to implement the adjustment in the **Federal Register**; applying adjusted penalty levels; and performing agency oversight of inflation adjustments.

BSEE is promulgating this 2022 inflation adjustment for the OCSLA maximum daily civil penalties as a final rule pursuant to the provisions of the FCPIA of 2015 and OMB's guidance. A proposed rule is not required because the FCPIA of 2015 expressly exempted the annual inflation adjustments implemented pursuant to the FCPIA of 2015 from the pre-promulgation notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* (the APA), allowing those adjustments to be published directly as final rules. Specifically, the FCPIA of 2015 states that agencies shall adjust civil monetary penalties ''notwithstanding Section 553 of the Administrative Procedure Act.'' (FCPIA of 2015 at § 4(b)(2)). This interpretation of the FCPIA of 2015 is confirmed by OMB Memorandum M–22–07 at 3–4 (''This means that the public procedure the APA generally requires—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.'').

II. Calculation of Adjustments

In accordance with the FCPIA of 2015 and the guidance provided in OMB Memorandum M–22–07, BSEE has calculated the necessary inflation adjustment for the maximum daily civil monetary penalty amount in 30 CFR 250.1403 for violations of OCSLA. The previous OCSLA civil penalty inflation adjustment accounted for inflation through October 2020. The required annual civil penalty inflation adjustment promulgated through this rule accounts for inflation through October 2021.

Annual inflation adjustments are based on the percent change between the CPI for all Urban Consumers (CPI–U) for the October preceding the date of the adjustment, and the prior year's October CPI–U. Consistent with the guidance in OMB Memorandum M–22–07, BSEE divided the October 2021 CPI–U by the October 2020 CPI–U to calculate the multiplying factor. In this case, the October 2021 CPI–U (276.589) divided by the October 2020 CPI–U (260.388) is 1.06222. OMB MemorandumM–22–07 confirms that this is the proper multiplier. (OMB Memorandum M–22–07 at 1 & n.4).

The FCPIA of 2015 requires that BSEE adjust the OCSLA maximum daily civil penalty amount for inflation using the applicable 2022 multiplier (1.06222). Accordingly, BSEE multiplied the existing OCSLA maximum daily civil penalty amount ($46,000) by 1.06222 to arrive at the new maximum daily civil penalty amount ($48,862.12). The FCPIA of 2015 requires that the resulting amount be rounded to the nearest $1.00 at the end of the calculation process. Accordingly, the adjusted OCSLA maximum daily civil penalty for 2022 is $48,862.

The adjusted penalty levels take effect immediately upon publication of this rule. Pursuant to the FCPIA of 2015, the increase in the OCSLA maximum daily civil penalty amount applies to civil penalties assessed after the date the increase takes effect, even when the associated violation(s) predates such increase. Consistent with the provisions of OCSLA and the FCPIA of 2015, this rule adjusts the following maximum civil monetary penalty per day per violation as follows:

CFR citation	Description of the penalty	Current maximum penalty	Multiplier	Adjusted maximum penalty
30 CFR 250.1403	Failure to comply per-day, per-violation	$46,000	1.06222	$48,862

III. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the OMB Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not significant. (*See* OMB Memorandum M–22–07 at 3).

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 further emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements, to the extent permitted by statute.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. (*See* 5 U.S.C. 603(a) and 604(a)). The FCPIA of 2015 expressly exempts these annual inflation adjustments from the requirement to publish a proposed rule for notice and comment. (*See* FCPIA of 2015 at § 4(b)(2); OMB Memorandum M–22–07 at 3–4). Thus, the RFA does not apply to this rulemaking.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(1) Does not have an annual effect on the economy of $100 million or more;

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and

(3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not effect a taking of private property or otherwise have takings implications under E.O. 12630. Therefore, a takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. To the extent that State and local governments have a role in Outer Continental Shelf activities, this rule will not affect that role. Therefore, a federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(1) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(2) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department of the Interior's consultation policy, under Departmental Manual Part 512 Chapters 4 and 5, and under the criteria in E.O. 13175. We have determined that it has no substantial direct effects on Federally recognized Indian Tribes or Alaska Native Claims Settlement Act (ANCSA) Corporations, and that consultation under the Department of the Interior's tribal and ANCSA consultation policies is not required.

I. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

J. National Environmental Policy Act

This rule does not constitute a major Federal action because of the non-discretionary nature of the civil penalty adjustment as required by law (40 CFR 1508.1(q)(1(ii)). The Department of Labor's CPI sets the annual civil penalty adjustment as required by the FCPIA of 2015. BSEE has no discretion in the execution of the civil penalty adjustments. Because this rule is not a Major Federal Action, it is therefore not subject to the requirements of the National Environmental Policy Act of 1969 (NEPA).

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. Therefore, a Statement of Energy Effects is not required.

List of Subjects in 30 CFR Part 250

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Investigations, Mineral resources, Oil and gas exploration, Penalties, Pipelines, Continental shelf—mineral resources, Continental Shelf—

rights-of-way, Reporting and recordkeeping requirements, and Sulfur.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, the BSEE amends Title 30, Chapter II, Subchapter B, part 250 of the Code of Federal Regulations as follows.

PART 250—OIL AND GAS AND SULFUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 1. The authority citation for 30 CFR part 250 continues to read as follows:

Authority: 30 U.S.C. 1751, 31 U.S.C. 9701, 33 U.S.C. 1321(j)(1)(C), 43 U.S.C. 1334.

■ 2. Revise § 250.1403 to read as follows:

§ 250.1403 What is the maximum civil penalty?

The maximum civil penalty is $48,862 per day per violation.

[FR Doc. 2022–03750 Filed 2–23–22; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE TREASURY

31 CFR Part 16

Program Fraud Civil Remedies

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: This final rule updates the definition of ''investigating official'' in the Department's Program Fraud regulations. The definition is revised to include inspectors general that have been established since the Program Fraud regulations were implemented. This final rule adopts a November 23, 2021 proposed rule without change.

DATES: Effective March 28, 2022.

FOR FURTHER INFORMATION CONTACT: Brian Sonfield, Assistant General Counsel for General Law, Ethics & Regulation at (202) 622–9804.

SUPPLEMENTARY INFORMATION:

Background and Proposed Rule

The Department promulgated implementing regulations for the Program Fraud Civil Remedies Act of 1986 (Act) (31 U.S.C. 3801 through 3812) on September 17, 1987 (52 FR 35071). The Act generally provides that any person who knowingly submits a false claim or statement to the Federal Government may be liable for an administrative civil penalty for each false claim or statement, and, in certain cases, to an assessment equal to double the amount falsely claimed.

The Act vests authority to investigate allegations of liability under its provisions in an agency's investigating official. Based upon the results of an investigation, the agency reviewing official determines, with the concurrence of the Attorney General, whether to refer the matter to a presiding officer for an administrative hearing. Any penalty or assessment imposed under the Act may be collected by the Attorney General, through the filing of a civil action, or by offsetting amounts other than tax refunds, owed the particular party by the federal government.

The Act grants agency investigating officials authority to require by subpoena the production of documentary evidence which is ''not otherwise reasonably available.'' If the case proceeds to hearing, the presiding officer may require the attendance and testimony of witnesses as well as the production of documentary evidence.

The Department of the Treasury adopted implementing regulations at 31 CFR part 16, which designated the Department's Assistant Secretary for Management as the authority head, designated the Department's Inspector General as the investigating official, and assigned the role of reviewing official to the General Counsel or designee.

On November 23, 2021 (86 FR 66497), the Department issued a proposed rule that would revise the definition of investigating official in § 16.2. Since the regulations were promulgated in 1987, three inspectors general have been established including the Treasury Inspector General for Tax Administration (See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206, 112 Stat. 685), the Special Inspector General for the Troubled Asset Relief Program (See Emergency Economic Stabilization Act of 2008, Pub. L. 110–343, 122 Stat. 3765), and the Special Inspector General for Pandemic Recovery (See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, 134 Stat. 281). The proposed revision would define investigating official as any Inspector General, including any Special Inspector General, with investigatory authority over programs of the Department of the Treasury.

This Final Rule

The public comment period on the proposed rule closed on January 6, 2022. One comment was received that supported the proposal. The Department appreciates the commenter's input.

For the reasons discussed in the proposed rule and this preamble, the Department adopts the proposed rule without change.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires agencies to prepare an initial regulatory flexibility analysis (IRFA) to determine the economic impact of the rule on small entities. A small entity is defined as either a small business, a small organization, or a small governmental jurisdiction; an individual is not a small entity. Section 605(b) of the RFA allows an agency to prepare a certification in lieu of an IRFA if the rule will not have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 605(b), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The rule is limited to updating the definition of investigating official for program fraud investigations in order to reflect current law. Accordingly, this rule will have no direct impacts on small entities.

Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a ''significant regulatory action'' under Executive Order 12866.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a rule that includes any federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This regulation does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

Federalism

Executive Order 13132 (titled Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law, within the meaning of the Executive order.

List of Subjects in 31 CFR Part 16

Administrative practice and procedure, Fraud, Investigations, Organizations and functions (Government agencies), Penalties.

For the reasons stated in the preamble, the Department of the Treasury amends 31 CFR part 16 as follows:

PART 16—REGULATIONS IMPLEMENTING THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 31 U.S.C. 3801–3812.

■ 2. In § 16.2, revise the definition of ''Investigating official'' to read as follows:

§ 16.2 Definitions.

* * * * *

Investigating official means any Inspector General, including any Special Inspector General, with investigatory authority over programs of the Department of the Treasury, as applicable.

* * * * *

Laurie Schaffer,

Acting General Counsel.

[FR Doc. 2022–03608 Filed 2–23–22; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2021–0778]

RIN 1625–AA09

Drawbridge Operation Regulation; Willamette River, Portland, OR

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the Morrison Bridge across the Willamette River, mile 12.8, at Portland, OR. Multnomah County, Oregon, the bridge owner, is requesting to change the current regulation to allow painting and preservation of the Morrison Bridge including the double bascule span. The modified rule would change normal bridge operations from a full span opening to a single leaf, or half span opening.

DATES: This rule is effective from 7 p.m. on April 1, 2022, through 7 p.m. on May 31, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov*. Type USCG–2021–0778 in the ''SEARCH'' box and click ''SEARCH.'' In the Document Type column, select ''Supporting & Related Material.''.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Steven M. Fischer, Bridge Administrator, Thirteenth Coast Guard District Bridge Program Office, telephone 206–220–7282; email *d13-smb-d13-bridges@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
TFR Temporary Final Rule
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code
County Multnomah County, Oregon Bridge Owner

II. Background Information and Regulatory History

On November 24, 2021, the Coast Guard published a notice of proposed rulemaking entitled ''Drawbridge Operation Regulation; Willamette River, Portland, OR'' in the **Federal Register** (86 FR 66988). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this temporary rule modification. During the comment period that ended December 27, 2021, we received no comments for this final rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 499. The Morrison Bridge across the Willamette River, mile 12.8, at Portland, OR, is a double bascule draw bridge. The subject bridge provides a vertical clearance of 69 feet, at center, and 48 feet on the sides in the closed-to-navigation position. The vertical clearance is unlimited when the draw is in the open-to-navigation position. All clearances are based on the Columbia River Datum 0.0. Marine traffic on this section of the Willamette River consists of vessels ranging from small pleasure craft up to large commercial vessels and barges. The Morrison Bridge operates in accordance with 33 CFR 117.897(c)(3)(iv). The county will be painting and preserving the Morrison Bridge including the double bascule span. The modified rule will change bridge operations from a full span opening to a single leaf, or half span opening. The purpose of this rule is to ensure safety of vessels and the navigable waters below the bridge.

IV. Discussion of Comments, Changes and the Rule

The Coast Guard provided a comment period of 30 days due to the fact the County had also performed an outreach to the waterway stakeholders before contacting the Coast Guard for this temporary rule request. As noted above, we received no comments on our NPRM published November 24, 2021. There are no changes in the regulatory text of this rule form the proposed rule in the NPRM.

This rule establishes a temporary change to 33 CFR 117.897(c)(3)(iv) to be in effect from 7 p.m. on April 1, 2022, through 7 p.m. on May 31, 2023. This rule temporarily suspends the current regulatory cite regarding the Morrison Bridge, and adds a temporary 33 CFR 117.897(c)(3)(vi) which amends the operating schedule of the Morrison Bridge by requiring a two-hour notice, or four-hour notice with tug assist, for all drawbridge vessel openings. By operating in single leaf opening mode the horizontal clearance of the bridge draw will be reduced by half that of a double leaf opening (dimensions are described below). The temporary rule is necessary to accommodate preservation and painting of the Morrison Bridge.

This bridge provides a vertical clearance approximately 69 feet, at the center, above Columbia River Datum 0.0 when in the closed-to-navigation position. One half of the bascule bridge will have a containment system installed on the non-opening half of the span, which will reduce the vertical clearance by 5 feet to 64 feet center and 43 feet on the sides. A tug will be available for assists to mariners as needed when a request is given with a notice of four hours for an opening. The horizontal clearance with a full opening is 185 feet, therefore, in single leaf operations, a temporary rule change will reduce the horizontal clearance to approximately 90 feet. Vessels able to transit under the Morrison Bridge without an opening may do so at any time. Marine vessels are advised to be aware of fall hazards. This section of the Willamette River has no alternate routes. During the Portland Rose Festival, both leafs of the double bascule span will be fully operational. If any mariner submits a full opening request to the County prior to construction beginning on April 1, 2022, a full opening can be scheduled. All marine emergency vessels can navigate under the Morrison Bridge without an opening, and therefore do not need to contact the Hawthorne Bridge for an emergency opening.

The County will open the Morrison Bridge's span in single span mode, half of the double bascule span, to marine vessels with a minimum of two-hour notice, or a four-hour notice if a tug assist is needed. We published that the west span will be operational at the beginning of construction and the east span will be closed to navigation. The dates to switch operational spans will be determined later and published in the Local and Broadcast Notice to Mariners. This temporary rule also allows a containment system under the bridge that reduces the non-opening half of the bridge's vertical clearance by 5 feet from 69 feet center to 64 feet, and from 48 feet on the sides to 43 feet.

This regulatory action determination is based on the ability of the Morrison Bridge to open on signal after the Hawthorne Bridge, at Willamette River mile 13.1, has received at least a two-hour notice, or four-hour notice for tug assist, by telephone at 503–988–3452 or VHF channel 13 radio request. The Coast Guard has made this finding based on the fact that this temporary rule allows any vessel needing a drawbridge opening to transit through the Morrison Bridge after providing adequate notice and being provided with tug assistance if required.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can still safely transit the bridge given advanced notice. In single leaf operations, the horizontal clearance will be approximately 90 feet. Vessels needing over 90 feet of vertical clearance will be able to safely transit using available tugs after giving four hours' notice. Vessels able to transit under the Morrison Bridge without an opening may do so at any time.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend § 117.897 by:
■ a. Staying paragraph (c)(3)(iv).
■ b. Adding paragraph (c)(3)(vi).

The addition reads as follows:

§ 117.897 Willamette River.

* * * * *

(c) * * *

(3) * * *

(vi) Morrison Bridge, Portland, mile 12.8, will open a single leaf of the double leaf bascule bridge, upon the receipt of a telephone (503–988–3452) or VHF channel 13 radio signal to the Hawthorne Bridge, at Willamette River mile 13.1, given at least a two-hour advance notice, or four-hour advance notice if tug assist is required.

Dated: February 16, 2022.

M.W. Bouboulis,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. 2022–03812 Filed 2–23–22; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AR04

Vocational Rehabilitation and Employment (VR&E) Program: Name Change; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Technical amendments.

SUMMARY: On February 16, 2022, the Department of Veterans Affairs (VA) published in the **Federal Register** a final rule that amended the regulations pertaining to the name of the Vocational Rehabilitation and Employment program to ''Veteran Readiness and Employment'' (VR&E). VA also amended the title of ''Vocational Rehabilitation and Employment Officer'' to ''Veteran Readiness and Employment Officer'' and the position of ''Director of Vocational Rehabilitation and Employment'' to ''Executive Director of Veteran Readiness and Employment''. This correction addresses minor technical errors in the published final rule.

DATES: This correction is effective February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Allison Bernheimer, Policy Analyst, Veteran Readiness and Employment Services (28), 810 Vermont Avenue NW, Washington, DC 20420, *allison.bernheimer@va.gov,* (202) 461–9600. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: VA is amending its final rule 2900–AR04, Vocational Rehabilitation and Employment (VR&E) Program: Name Change, to fix technical errors published on February 16, 2022, in the **Federal Register** at 87 FR 8740. Specifically, in updating the position title of ''Vocational Rehabilitation and Employment Office'' to ''Veteran Readiness and Employment Officer'' and ''Director of Vocational Rehabilitation and Employment'' to ''Executive Director of Veteran Readiness and Employment''. Therefore, VA is issuing these amendments to correct these errors.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons discussed above, VA corrects 38 CFR part 21 by making the following correcting amendment:

PART 21—VETERAN READINESS AND EMPLOYMENT AND EDUCATION

Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

■ 1. The authority citation for part 21, subpart C, continues to read as follows:

Authority: 38 U.S.C. 501(a), 512, 3500–3566, and as noted in specific sections.

§ 21.3303 [Amended]

■ 2. Amend § 21.3303 in paragraph (a) by:

■ a. Removing in the second sentence the words ''Director, Vocational Rehabilitation and Employment Service'' and adding in their place the words ''Executive Director, Veteran Readiness and Employment (VR&E) Service''.

■ b. Removing in the third sentence the words ''Director, Vocational Rehabilitation and Employment Service'' and adding in their place the words ''Executive Director, VR&E Service''.

[FR Doc. 2022–03838 Filed 2–23–22; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2021–0620; FRL–9188–02–R9]

Air Plan Approval; California; Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Ventura County Air Pollution Control District (VCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern emissions of volatile organic compounds (VOCs) from surface cleaning and degreasing operations, and from batch loaded vapor degreasing operations. We are approving changes to SIP-approved local rules to regulate these emission sources under the Clean Air Act (CAA or the Act).

DATES: Effective on March 28, 2022.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2021–0620. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: La Kenya Evans, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3245 or by email at *evans.lakenya@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Proposed Action

On October 27, 2021 (86 FR 11130), the EPA proposed to approve the following rules into the California SIP.

Local agency	Rule No.	Rule title	Revised and adopted	Submitted
VCAPCD	74.6	Surface Cleaning and Degreasing	11/10/2020	07/26/2021
VCAPCD	74.6.1	Batch Loaded Vapor Degreasers	11/10/2020	07/26/2021

We proposed to approve these rules because we determined that they comply with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving these rules into the California SIP. The November 10, 2020 versions of Rule 74.6 and Rule 74.6.1 will replace the previously approved versions of these rules in the SIP.[1]

IV. Incorporation by Reference

In these rules, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Ventura County Air Pollution Control District rules described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the

[1] 70 FR 61561 (October 25, 2005).

appropriate circuit by April 25, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 15, 2022.

Martha Guzman Aceves,

Regional Administrator, Region IX.

For the reasons stated in the preamble, the Environmental Protection Agency amends part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(336)(i)(B)(*2*) and (*3*) and (c)(569) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(336) * * *

(i) * * *

(B) * * *

(*2*) Previously approved on October 25, 2005, in paragraph (c)(336)(i)(B)(*1*) of this section and now deleted with replacement in (c)(569)(i)(A)(*1*), Rule 47.6 adopted on November 11, 2003.

(*3*) Previously approved on October 25, 2005, in paragraph (c)(336)(i)(B)(*1*) of this section and now deleted with replacement in (c)(569)(i)(A)(*2*), Rule 47.6.1 adopted on November 11, 2003.

* * * * *

(569) Amended regulations for the following APCDs were submitted on July 26, 2021 by the Governor's designee.

(i) *Incorporation by reference.*

(A) Ventura County Air Pollution Control District

(*1*) Rule 74.6 ''Surface Cleaning and Degreasing,'' revised on November 10, 2020.

(*2*) Rule 74.6.1 ''Batch Loaded Vapor Degreasers,'' amended on November 10, 2020.

(B) [Reserved]

(ii) [Reserved]

[FR Doc. 2022–03689 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 538 and 552

[GSAR Case 2020–G509; Docket No. GSA–GSAR 2021–0015; Sequence No. 1]

RIN 3090–AK19

General Services Administration Acquisition Regulation (GSAR); Extending Federal Supply Schedule Orders Beyond the Contract Term

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA is issuing a final rule amending the General Services Administration Acquisition Regulation (GSAR) to incorporate existing internal GSA Federal Supply Schedule (FSS) policy concerning the option to extend the term of the contract and the performance of orders beyond the term of the base FSS contract.

DATES: Effective March 28, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas O'Linn, Procurement Analyst, at *gsarpolicy@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite GSAR Case 2020–G509.

SUPPLEMENTARY INFORMATION:

I. Background

GSA published a proposed rule at 86 FR 48617 on August 31, 2021, to amend the GSAR to incorporate existing internal Federal Supply Schedule (FSS) policy concerning the option to extend the term of the contract and performance of orders beyond the term of the base FSS contract. Specifically, this rule incorporates into the GSAR FSS clause I–FSS–163, Option to Extend the Term of the Contract (Evergreen), and FSS policy concerning standard fill-in information for paragraph (d) of FAR clause 52.216–22, Indefinite Quantity.

II. Discussion and Analysis

A. Summary of Significant Changes

There are no significant changes from the proposed rule. However, two minor editorial changes have been made. The two minor editorial changes are as follows:

• Removal of the proposed changes to 517.207 from the final rule. The reason is because 517.207 is no longer regulatory as the section was made non-regulatory under a final rule published at 86 FR 28499 on May 27, 2021, and corrected at 86 FR 61079 published on November 5, 2021; and

• Change the prescription language for GSAR Clause 552.238–116, Option to Extend the Term of the FSS Contract, noted at section 538.238(d)(36). The final rule changes the prescription from ''Use in all FSS solicitations and contracts'' to ''Use in FSS solicitations and contracts when appropriate.'' This change recognizes that not all FSS contracts are five year contracts with three five year options (*e.g.,* VA Schedules).

B. Analysis of Public Comments

No public comments were received in response to the proposed rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been reviewed and determined by Office of Management and Budget (OMB) not to be a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

IV. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a ''major rule'' may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The General Services Administration will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule has been reviewed and determined by OMB not to be a ''major rule'' under 5 U.S.C. 804(2).

V. Regulatory Flexibility Act

GSA does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

Therefore, a Final Regulatory Flexibility Analysis has not been performed. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2020–G509), in correspondence.

VI. Paperwork Reduction Act

This final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 538 and 552

Government procurement.

Jeffrey Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy, General Services Administration.

Therefore, GSA amends 48 CFR parts 538 and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 538 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

■ 2. Revise section 538.270 heading to read as follows:

538.270 Solicitation, evaluation, and award of Federal Supply Schedule (FSS) contracts.

■ 3. Amend section 538.273 by adding paragraphs (d)(36) and (e) to read as follows:

538.273 FSS solicitation provisions and contract clauses.

* * * * *

(d) * * *

(36) 552.238–116, Option to Extend the Term of the FSS Contract. Use in FSS solicitations and contracts when appropriate.

(e) Insert the following fill-in information within the blank of paragraph (d) of FAR clause 52.216–22, Indefinite Quantity: ''the completion of customer order, including options, 60 months following the expiration of the FSS contract ordering period''.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Add section 552.238–116 to read as follows:

552.238–116 Option to Extend the Term of the FSS Contract.

As prescribed in 538.273(d)(36), insert the following clause:

Option To Extend the Term of the FSS Contract (Mar 2022)

(a) The Government may require continued performance of this contract for an additional 5 year period. This option may be exercised up to three times.

(b) The Contracting Officer may exercise the option by providing written notice to the Contractor 30 days before the contract expires.

(End of clause)

[FR Doc. 2022–03808 Filed 2–23–22; 8:45 am]

BILLING CODE 6820–61–P

Proposed Rules

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0147; Project Identifier MCAI–2021–01022–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus SAS Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes). This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by April 11, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For material that will be incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0147.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0147; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2022–0147; Project Identifier MCAI–2021–01022–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Dan Rodina, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0204, dated September 14, 2021 (EASA AD 2021–0204) (also referred to as the MCAI), to correct an unsafe condition for all Model A300–600 series airplanes.

EASA AD 2021–0204 specifies that it requires certain tasks (limitations) already required by EASA AD 2019–0090, dated April 26, 2019 (which corresponds to FAA AD 2019–21–01, Amendment 39–19767 (84 FR 56935, October 24, 2019) (AD 2019–21–01)), and invalidates (terminates) prior instructions for those tasks. This proposed AD would, for AD 2019–21–

01, terminate the limitation for the tasks identified in the service information referred to in EASA AD 2021–0204 only.

This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is proposing this AD to address fatigue cracking, accidental damage, or corrosion in principal structural elements, which could result in reduced structural integrity of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0204 specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type designs.

Proposed AD Requirements in This NPRM

This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2021–0204 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (k)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2021–0204 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2021–0204 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2021–0204 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2021–0204. Service information required by EASA AD 2021–0204 for compliance will be available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0147 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in the AMOCs paragraph under ''Other FAA Provisions.'' This new format includes a ''New Provisions for Alternative Actions or Intervals'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

Costs of Compliance

The FAA estimates that this proposed AD would affect 118 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA has determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

Airbus SAS: Docket No. FAA–2022–0147; Project Identifier MCAI–2021–01022–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by April 11, 2022.

(b) Affected ADs

This AD affects AD 2019–21–01, Amendment 39–19767 (84 FR 56935, October 24, 2019) (AD 2019–21–01).

(c) Applicability

This AD applies to all Airbus SAS airplanes identified in paragraphs (c)(1) through (4) of this AD, certificated in any category.

(1) Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes.

(2) Model A300 B4–605R and B4–622R airplanes.

(3) Model A300 F4–605R and F4–622R airplanes.

(4) Model A300 C4–605R Variant F series airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address fatigue cracking, accidental damage, or corrosion in principal structural elements, which could result in reduced structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0204, dated September 14, 2021 (EASA AD 2021–0204).

(h) Exceptions to EASA AD 2021–0204

(1) Where EASA AD 2021–0204 refers to its effective date, this AD requires using the effective date of this AD.

(2) The requirements specified in paragraphs (1) and (2) of EASA AD 2021–0204 do not apply to this AD.

(3) Paragraph (3) of EASA AD 2021–0204 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA 2021–0204 is at the applicable ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2021–0204, or within 90 days after the effective date of this AD, whichever occurs later.

(5) The provisions specified in paragraphs (4) of EASA AD 2021–0204 do not apply to this AD.

(6) The ''Remarks'' section of EASA AD 2021–0204 does not apply to this AD.

(i) Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2021–0204.

(j) Terminating Action for AD 2019–21–01

Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2019–21–01, for the tasks identified in the service information referred to in EASA AD 2021–0204 only.

(k) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (l)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(l) Related Information

(1) For EASA AD 2021–0204, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0147.

(2) For more information about this AD, contact Dan Rodina, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov.*

(3) For service information identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on February 17, 2022.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2022–03849 Filed 2–23–22; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2021–0727; FRL–9552–01–R3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; 2017 Base Year Emissions Inventories for the Washington, DC-MD-VA Nonattainment Area for the 2015 Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve state implementation plan (SIP) revisions submitted by the District of Columbia (DC), State of Maryland (MD), and Commonwealth of Virginia (VA) (collectively, the States). This revision consists of the base year inventory for the Washington, DC-MD-VA nonattainment area (the DC Area) for the 2015 ozone national ambient air quality standards (NAAQS). This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before March 28, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2021–0727 at *https://www.regulations.gov,* or via email to *Gordon.Mike@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Michael O'Shea, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2064. Dr. O'Shea can also be reached via electronic mail at *OShea.Michael@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 7, 2020, the Maryland Department of the Environment (MDE) submitted a revision to the Maryland SIP entitled, ''SIP—20–04 2017 Base Year Inventory for the Washington, DC-MD-VA 2015 Ozone NAAQS Nonattainment Area.'' This revision is referred to as the ''MD submittal'' in this rulemaking. On November 4, 2020, the District of Columbia Department of Energy and Environment (DOEE), submitted a revision to the DC SIP entitled, ''DC 2015 Ozone NAAQS Attainment Plan Base Year Inventory.'' This revision is referred to as the ''DC submittal'' in this rulemaking. On December 11, 2020, the Virginia Department of Environmental Quality (VADEQ) submitted a revision to the Virginia SIP entitled, ''8-Hour Ozone (2015 Standard)—Washington Attainment Plan 'VA_2017O3BYEI_12112020.' '' This revision is referred to as the ''VA submittal'' in this rulemaking. These individual SIPs were collaboratively developed by DOEE, MDE, VADEQ, and the Metropolitan Washington Council of Government (MWCOG). The individual state SIP revisions, referred to collectively in this rulemaking action as the ''DC Area base year inventory SIPs,'' address the base year inventory requirement for the DC Area for the 2015 ozone NAAQS. The individual state SIP submissions, including their appendices, are included in the docket for this rulemaking and are available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2021–0727.

I. Background

On October 1, 2015, EPA strengthened the 8-hour ozone NAAQS, lowering the level of the NAAQS from 0.075 ppm parts per million (ppm) to 0.070 ppm. 80 FR 65292 (October 26, 2015). Effective August 3, 2018, EPA designated the following jurisdictions in the DC Area as marginal nonattainment for the 2015 ozone NAAQS: District of Columbia; Calvert, Charles, Frederick, Montgomery, and Prince George's Counties in MD; and Arlington, Fairfax, Loudoun, and Prince William Counties and Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park Cities in VA. 83 FR 25776 (June 4, 2018). CAA section 182(a)(1) requires ozone nonattainment areas classified as marginal or above to submit a comprehensive, accurate, current inventory of actual emissions from all emissions sources in the nonattainment area, known as a ''base year inventory.'' The DC Area base year inventory SIPs addresses a base year inventory requirement for the DC Area.

II. Summary of SIP Revision and EPA Analysis

A. EPA's Evaluation of the DC Area Base Year Inventory SIPs

EPA's review of the DC Area base year inventory SIPs indicate that they meet the base year inventory requirements for the 2015 ozone NAAQS. EPA prepared a Technical Support Document (TSD) for each state's submittal in support of this rulemaking. In those TSDs, EPA reviewed the results, procedures, and methodologies for the SIP base year, and found them to be acceptable and developed in accordance with EPA's technical guidance. EPA's TSDs for the individual state SIPs are available online at *http://www.regulations.gov,* Docket ID No. EPA–R03–OAR–2021–0727.

B. Base Year Inventory Requirements

In EPA's December 6, 2018 rule, ''Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements,'' known as the ''SIP Requirements Rule,'' EPA set out nonattainment area requirements for the 2015 ozone NAAQS. (83 FR 62998). The SIP Requirements Rule established base year inventory requirements, which were codified at 40 Code of Federal Regulations (CFR) 51.1315. As required by 40 CFR 51.1315(a), each 2015 ozone nonattainment area must submit a base year inventory within 2 years of designation.

Also, 40 CFR 51.1315(a) requires that the inventory year be selected consistent with the baseline year for the reasonable further progress (RFP) plan as required by 40 CFR 51.1310(b), which states that the baseline emissions inventory shall be the emissions inventory for the most recent calendar year for which a complete triennial inventory is required to be submitted to EPA under the provisions of subpart A of 40 CFR part 51, Air Emissions Reporting Requirements, 40 CFR 51.1 through 50. The most recent triennial inventory year conducted for the National Emissions

Inventory (NEI) pursuant to the Air Emissions Reporting Requirements (AERR) rule is 2017. 73 FR 76539 (December 17, 2008). The States selected 2017 as their baseline emissions inventory year for RFP. This selection comports with EPA's implementation regulations for the 2015 ozone NAAQS because 2017 is the inventory year. 40 CFR 51.1310(b).[1]

Further, 40 CFR 51.1315(c) requires emissions values included in the base year inventory to be actual ozone season day emissions as defined by 40 CFR 51.1300(q), which states: Ozone season day emissions means an average day's emissions for a typical ozone season work weekday. The state shall select, subject to EPA approval, the particular month(s) in the ozone season and the day(s) in the work week to be represented, considering the conditions assumed in the development of RFP plans and/or emissions budgets for transportation conformity. The States included actual ozone season day emissions, pursuant to 40 CFR 51.1315(c).

C. DC Area Base Year Inventory SIPs

The DC Area base year inventory SIPs, contain an explanation of each State's 2017 base year emissions inventory for stationary, non-point, non-road, and on-road anthropogenic sources, as well as biogenic sources, in the DC Area. The States estimated anthropogenic emissions for volatile organic compound (VOC), nitrogen oxide (NOx), and carbon monoxide (CO) for a typical ozone season work weekday. As identified above, the DC Area base year inventory SIPs were developed collaboratively. As such, their 2017 base year emissions inventory are almost identical and, therefore, will be referred to collectively as the ''2017 DC Area BYEI'' in the remainder of this rulemaking, unless otherwise noted because individual distinctions are necessary.[2]

The States developed the 2017 DC Area BYEI with the following source categories of anthropogenic emissions sources: Point, quasi-point, non-point, non-road model, on-road, and commercial marine vessels, airport, and railroad (MAR) emissions sources, in addition to biogenic total sources. The 2017 DC Area BYEI sets out the methodologies the States used to develop their base year inventory for each source listed. Those methodologies are explained in further depth within appendices A–D of each state's submission. Data justifying the inventories are also provided within appendices A–D of each state's submission. Note, however, that Virginia only included appendix items relevant to their own state but uploaded files jointly with DC for the full inventory development. Furthermore, the MD submittal was earliest and, as such, contains data, development, and guidance that precedes the widespread adoption of the 2017 NEI. This timing differential accounts for the differences in the MD submittal as compared to the DC and VA submittals. For simplicity purposes, the appendices will be referred to as the State's appendices.

1. Point Sources

Point sources are larger sources that are located at a fixed, stationary location. As defined by the AERR in 40 CFR 51.50, point sources are large, stationary (non-mobile), identifiable sources of emissions that release pollutants into the atmosphere. A point source is a facility that is a major source under 40 CFR part 70 for one or more of the pollutants for which reporting is required by 40 CFR 51.15(a)(1). Examples of point source emissions categories include power plants, industrial boilers, petroleum refineries, cement plants, and other industrial plants.

As stated in the State's 2017 DC Area BYEI, the State's air agencies (DOEE, MDE, VADEQ), maintain substantial databases of both small and large air emission sources. Point sources in the inventory generally related to facilities contained within the EPA's Emissions Inventory System (EIS). From the EIS, NEI point source estimates are created. Common types of facilities included are large industrial or commercial complexes including municipal waste combustors, electric generating stations, governmental organizations, and manufacturing facilities. The methods used to convert annual emissions to ozone season work weekday emissions are described in the State's appendices: For DC emissions—Appendix A1a,[3,4] for MD emissions—Appendix B1b,[5,6] and for VA emissions—Appendix A1b.[7,8,9] The States keep records of point sources and emissions and these records maintained by the respective state air agency where the facilities or sources are located. The emissions data for the DC area are housed in the State's appendices: for DC emissions—Appendix A2a,[10,11] for MD emissions—Appendix B2b,[12,13] and for VA—Appendix A2b.[14,15,16]

As stated in the State's Appendix A1a, DOEE recorded data for all the point, unit, stack, and process sources submitted to the EPA for the 2017 NEI. DOEE also provided their point source inventory with NO_X, VOC, and CO in tons. Ozone Season Day (OSD) emissions calculations were also justified by DOEE. See the State's Appendix A1a for additional details on methodology; see also EPA's DC TSD.[17]

As seen in the State's Appendix B1b, the MDE Air and Radiation Administration (ARA) compiled the point source emissions inventory. They identified sources, documented the methods for calculations, and presented findings. MDE has a substantial database of air emissions sources and permitting, and its compliance programs also played a major role in their investigation. They provided full point source data in the State's Appendix B2b for CO, NO_X, and VOC and provided justification for OSD calculations. See the State's Appendix B1b for additional

[1] On January 29, 2021, the Court of Appeals for the D.C. Circuit issued its decision regarding multiple challenges to EPA's implementation rule for the 2015 ozone NAAQS which included, among other things, upholding this provision allowing states to use an alternative baseline year for RFP. *Sierra Club* v. *EPA,* No. 15–1465 (D.C. Cir.). The other provisions of EPA's ozone implantation rule at issue in the case are not relevant for this rulemaking.

[2] The 2017 DC Area BYEI submitted by each individual state is found as follows: DC submittal—Appendix BY2017 _EI_Document_October_30_ 2020_FINAL; MD submittal—Appendix 2. Wash Region 2015 NAAQS BY Inventory SIP; and VA submittal—Appendix NVA–INV–SIP–1.

[3] Appendix A1a—Point Source Inventory Development Overview (District of Columbia), DC submittal.

[4] Appendix A1a—Point Source Inventory Development Overview (District of Columbia), MD submittal.

[5] Appendix B1b—Point, Quasi-Point, Nonpoint and Marine/Air/Rail Inventory Development Overview (Maryland), DC submittal.

[6] Appendix B1b—Point, Quasi-Point, Nonpoint and Marine/Air/Rail Inventory Development Overview (Maryland), MD Submittal.

[7] Appendix A1b—Point Source Inventory Development Overview (Virginia), DC submittal.

[8] Appendix A1b—Point Source Inventory Development Overview (Virginia), MD submittal.

[9] Appendix A1b—Point Source Inventory Development Overview (Virginia), VA submittal.

[10] Appendix A2a—Point Source Inventory Files (District of Columbia), DC submittal.

[11] Appendix A2a—Point Source Inventory Files (District of Columbia), MD submittal.

[12] Appendix B2b—Point, Quasi-Point, Nonpoint and Marine/Air/Rail Inventory Files (Maryland), DC submittal.

[13] Appendix B2b—Point, Quasi-Point, Nonpoint and Marine/Air/Rail Inventory Files (Maryland), MD submittal.

[14] Appendix A2b—Point Source Inventory Files (Virginia), DC submittal.

[15] Appendix A2b—Point Source Inventory Files (Virginia), MD submittal.

[16] Appendix A2b—Point Source Inventory Files (Virginia), VA submittal.

[17] EPA's DC TSD for the 2017 Base Year Inventory for the DC Area.

details on methodology; see also EPA's MD TSD.[18]

In the State's Appendix A1b, Virginia noted that they keep a detailed database for point sources called the *Comprehensive Environmental Database System* (CEDS). As noted above, emissions data for facilities can include emission tests, Title V reports, compliance reports and other documents mentioned in the State's Appendix A1b and documented in Appendix A2b. The VADEQ staff attested to reviewing the data and uploading information required for AERR to be included for the 2017 NEI. They provided full point sources data for NO_X, VOC, and CO, typically in tons and provided justification for OSD emissions. See the State's Appendix A1b for additional details on methodology; see also EPA's VA TSD.[19]

2. Quasi-Point Sources

The only quasi-point source in the DC area, Andrews Air Force Base (Joint Base Andrews—JBA), is located in Prince George's County, MD. MDE identified facilities at this location that due to size or function are considered point sources. In the State's Appendix B1b, MDE notes that these establishments include a wide variety of air emissions sources, including point sources, on-road mobile sources, off-road mobile sources, and area sources.

For Joint Base Andrews, the emissions from the other source categories at the facility are totaled under a single point source and considered by MDE as being a quasi-point source. As noted in the EPA's MD TSD, for each of these quasi-point sources, emissions for each source category at the facility were calculated separately to find the ozone season day emissions, and then totaled together to get a facility wide emission for each pollutant. Data outlining quasi-point sources are provided in the State's Appendix B2b. EPA has reviewed the source categories included in the quasi-point sources and has found this to be a reasonable approach to handle these sources.

3. Non-Point Sources

Non-point sources are also called ''area sources.'' These sources collectively represent individual sources of emissions that have not been inventoried as specific point or mobile sources. These individual sources treated collectively as non-point sources are typically too small, numerous, or difficult to inventory using the methods for the other classes of sources. As noted in the 2017 DC Area BYEI, for example, small fossil fuel fired boilers used for comfort purposes located at residential, commercial, and governmental locations fall into this category.

The non-point category is broad and diverse, and the emissions calculations used in this category vary and the category has many subsectors. State air agencies provided details for developing emissions for nonpoint sources in the State's appendices: for DC emissions—Appendix B1a,[20] [21] for MD emissions—Appendix B1b, and for VA emissions—Appendix B1c (VA).[22] [23] [24] Note that stage II refueling emissions were developed by the National Capital Region Transportation Planning Board (TSB) at MWCOG in association with staff and State's air agencies using the Motor Vehicle Emissions Simulator (MOVES) 2014b model. See the State's Appendix D1 [25] [26] [27] for details on development of on-road emissions.

As noted in EPA's MD TSD, nonpoint emissions are typically calculated on an annual basis by multiplying an emission factor by some known indicator of collective activity for each source category at the county level. For the 2017 DC Area BYEI, DOEE calculated the ozone season day emissions by applying a seasonal adjustment factor, provided by MDE, and supplemented by DOEE, to their emission estimates. See the State's Appendix B1a for calculations. In the State's Appendix B2a,[28] [29] nonpoint sector categories in the District's emissions inventory were catalogued, including contributions to the 2017 NEI. NO_X, VOC, and CO data were provided in tons, and both annual and ozone season totals were included.

MDE, as indicated above, applied a seasonal adjustment factor to their emissions estimates. As noted in EPA's MD TSD, a detailed explanation of how MDE calculated each nonpoint source category can be found in Section 4—Area Sources of the State's Appendix B1b. Emissions were provided annually and by ozone season day for each nonpoint source category code (SCC) for NO_X, VOC, and CO. Full data is provided in the State's Appendix B2b.

For Virginia, a detailed explanation of the non-point inventory is provided in the State's Appendix B1c. As they note, staff from the VADEQ compiled Northern Virginia 2017 annual and ozone season daily emissions estimate from the EPA 2017 NEI. In the State's Appendix B2c,[30] [31] [32] VADEQ outlines sample calculations for their nonpoint and MAR emissions for each pollutant. In the State's Appendix B2c, activity level data, emission factor, control factors, fuel loading factors, and others are provided in addition to raw data for OSD. Virginia followed MDE's guidance for calculating OSD and provided examples of their calculations in the State's Appendix B1c. Data for NO_X, VOC and CO were provided in OSD and annually.

4. Non-Road Model Mobile Sources

Non-road mobile sources are also called ''off-highway'' mobile sources. These are defined as a non-road engine or non-road vehicle. As per 40 CFR 51.50, a non-road engine is an internal combustion engine (including the fuel system) that is not used in an on-road motor vehicle or a vehicle used solely for competition, or that is not affected by sections 111 or 202 of the CAA. Also defined by 40 CFR 51.50, a non-road vehicle (rather than engine) is a vehicle that is run by a non-road engine and that is not an on-road motor vehicle or a vehicle used solely for competition. Examples of non-road mobile sources include airport ground support equipment, agricultural and construction equipment powered by an internal combustion engine, and lawn and garden engines and equipment.

As explained in the 2017 DC Area BYEI, the inventory for nonroad mobile sources, and some MAR sources, for VOC, NO_X, and CO were calculated using the EPA's MOVES2014 model. This model includes 88 types of nonroad equipment and 12 economic sectors. The sectors are:

[18] EPA's MD TSD for the 2017 Base Year Inventory for the DC Area.

[19] EPA's VA TSD for the 2017 Base Year Inventory for the DC Area.

[20] Appendix B1a—Nonpoint and Marine/Air/Rail Inventory Development Overview (District of Columbia), DC submittal.

[21] Appendix B1a—Nonpoint and Marine/Air/Rail Inventory Development Overview (District of Columbia), MD submittal.

[22] Appendix B1c—Virginia Nonpoint and Marine/Air/Rail Inventory Development Overview, DC submittal.

[23] Appendix B1c –Nonpoint and Marine/Air/Rail Inventory Development Overview (Virginia), MD submittal.

[24] Appendix B1c—Virginia Nonpoint and Marine/Air/Rail Inventory Development Overview, VA submittal.

[25] Appendix D1—On-road Mobile Source Inventory Development Overview, DC submittal.

[26] Appendix D1—On-road Mobile Source Inventory Development Overview, MD submittal.

[27] Appendix D1—On-road Mobile Source Inventory Development Overview, VA submittal.

[28] Appendix B2a—Nonpoint and Marine/Air/Rail Inventory Files (District of Columbia), DC submittal.

[29] Appendix B2a—Nonpoint and Marine/Air/Rail Inventory Files (District of Columbia), MD submittal.

[30] Appendix B2c—Nonpoint and Marine/Air/Rail Inventory Files (Virginia), DC submittal.

[31] Appendix B2c—Nonpoint and Marine/Air/Rail Inventory Files (Virginia), MD submittal.

[32] Appendix B2c—Nonpoint and Marine/Air/Rail Inventory Files (Virginia), VA submittal.

- Recreational sector equipment, such as all-terrain vehicles and off-road motorcycles;
- Construction sector equipment, such as graders and backhoes;
- Industrial sector equipment, such as forklifts and sweepers;
- Lawn and garden sector equipment, such as leaf and snow blowers;
- Agricultural sector equipment, such as tractors;
- Commercial sector equipment, such as compressors;
- Logging sector equipment, such as chain saws;
- Airport support sector equipment, such as airport ground support equipment;
- Underground mining sector equipment, such as, mining equipment;
- Oil field sector equipment, such as oil field equipment;
- Pleasure craft sector equipment, such as personal watercraft; and
- Railroad sector equipment, such as railway maintenance equipment.

As noted in the 2017 DC Area BYEI, the MOVES2014b model estimates emissions for each specific type of nonroad equipment by multiplying the following input data estimates:

- Equipment population for the base year, distributed by age, power, fuel type, and application;
- Average load factor expressed as average fraction of available power;
- Available power in horsepower;
- Activity in hours of use per year; and
- Emission factors reflecting deterioration and/or new standards.

The emissions are then temporally allocated using appropriate allocation factors. All emissions sources are included for DC and Maryland. However, railway maintenance and airport ground support equipment were not included for Virginia. Instead, Virginia provided emissions for these sources from the 2017 NEI effort. See the State's Appendix D1 for details and Appendix C [33] [34] [35] [36] for MOVES2014b nonroad model input, output, and runspec files.

5. Marine Vessels, Airport, Railroad Locomotives Sources

Marine Vessels, Airport, Railroad Locomotives (MAR) is a non-road sub-category. Detailed documentation for the development of MAR sources were given by the States air agencies, as noted in the 2017 DC Area BYEI. As above, MAR guidance overviews are in the State's appendices: For DC emissions—Appendix B1a, for MD emissions—Appendix B1b, and for VA emissions—Appendix B1c. The MAR data is listed in the State's appendices: For DC emissions—Appendix B2a, for MD emissions—Appendix B2b, and for VA emissions—Appendix B2c.

For DC, railway maintenance emissions were developed using the MOVES2014b model. DC provided airport emissions from the 2017 NEI and the facilities in DC's airport inventory. The district also provided details on their OSD calculations for all MAR sources in the State's Appendix B1a with some information in the 2017 DC Area BYEI.

MDE relied on the MOVES2014b model for railways maintenance and airport ground support equipment using the above model. MDE calculated emissions by collecting data directly from surveyed sources, or activity from state and Federal reporting agencies. Details of the development of emissions for MAR sources along with other non-road model sources and their OSD approach are provided in the State's Appendix B1b with some information in the 2017 DC Area BYEI.

For Virginia, the 2017 NEI was used for all emissions calculations including for railway maintenance and airport ground support equipment. Sample calculations were provided in the State's Appendix B1c by the VADEQ for annual emissions estimates for all sources. The state also outlined their approach for OSD calculations is the State's Appendix B1c.

6. On-Road Mobile Sources

On-road mobile sources are also called ''highway mobile sources.'' These sources are the motor vehicles (*e.g.,* automobiles, buses, trucks) traveling on local and highway roads. On-road mobile sources should be estimated by the latest recommended on-road mobile source models. Currently, that means EPA's MOVES model for all states but California.

In addition to emissions from vehicles' exhaust, the MOVES model estimates evaporative emissions for mobile sources, which must be included in the inventory. Volatile hydrocarbons evaporate from the fuel system while a vehicle is refueling, parked, or driving. Evaporative processes differ from exhaust emissions because they don't directly involve combustion, which is the main process driving exhaust emissions.

As stated in the State's Appendix D1 and in the 2017 DC Area BYEI, the TSB was responsible for developing the on-road mobile sources emissions using information, such as meteorological inputs from Metropolitan Washington Air Quality Committee (MWAQC) and fuel, inspection and maintenance program information from state air agencies. EPA's MOVES2014b model was selected to estimate the 2017 DC Area BYEI on-road emissions inventories for the 2015 ozone national ambient air quality standard emissions from on-road mobile sources in the DC area. The emissions results were reviewed by MWAQC staff and approved and incorporated into the 2017 inventories. The On-Road MOVES2014b input and output files are in the State's Appendix D2.[37] [38] [39] [40]

As noted in the State's Appendix D1, first, TSB's adopted travel demand model was used to estimate vehicle miles of travel (VMT) at the network link level of analysis. The modeled VMT outputs were developed at the network link level by vehicle type and by four time-of-day periods. Next, a post processor was used to further refine link-level VMT and link speeds into vehicle-hours of travel (VHT) by facility type, hourly periods, and speed bins. Finally, several data preparation steps were undertaken before MOVES was executed. Again, an overview of the process is presented in the State's Appendix D1. Lastly, the MOVES model was executed to calculate base year emissions.

Overall, the MOVES model considered factors such as vehicle type, facility type, VMT/VHT fractions, observed and simulated VMT, speed distributions, road type, age of cars, fuel formation, meteorological data, ramp fraction, road type distribution (for VMT), source (vehicle) type population, inspection/maintenance programs, hoteling (idling), and source type programs by state. All factors are outlined in detail in the State's Appendix D1. The on-road mobile emissions analysis process is very similar to the one used during the development of previous base year inventories.

[33] Appendix C—MOVES 2014b (Nonroad Mobile Model) Input and Output Files, DC Submittal.

[34] Appendix C—MOVES 2014b (Nonroad Mobile Model) Input and Output Files, MD Submittal.

[35] Appendix C—MOVES 2014b (Nonroad Mobile Model) Input and Output Files, VA Submittal.

[36] Appendix C—MOVES 2014b, which is included in each State's submission, is a large datafile. It is described in a memo for this rulemaking. This file itself is not available on *regulation.gov* but can be provided upon request.

[37] Appendix D2—MOVES 2014b (Onroad Mobile Model) Input and Output Files, DC submittal.

[38] Appendix D2—MOVES 2014b (Onroad Mobile Model) Input and Output Files, MD submittal.

[39] Appendix D2—MOVES 2014b (Onroad Mobile Model) Input and Output Files, VA submittal.

[40] Appendix D2—MOVES 2014b, which is included in each State's submission, is a large datafile. It is described in a memo for this rulemaking. The file itself is not available on *regulations.gov* but can be provided upon request.

EPA has reviewed the results, procedures, and methodologies utilized by the States to determine anthropogenic emissions for the DC Area for the SIP base year, as well as comparing the inventory with previously verified data in EPA's 2017 NEI for any data discrepancies and found none. EPA has therefore determined the base year inventory to be acceptable and developed in accordance with EPA's technical guidance.

7. Biogenic Emissions

The States also outlined biogenic emissions, which are not included in the anthropogenic total. Biogenic emissions come from natural sources, including vegetation and soils. In the 2017 DC Area BYEI, the States explain that the 2014 NEI estimates by EPA were accepted for purposes of the base year 2017 biogenic inventories. These methods are acceptable under EPA's emission inventory guidance.[41]

8. Emissions Summary

The State's 2017 DC Area BYEI contain a summary of 2017 ozone season day emissions by source category, which are presented in Table 1 of this document. Note, for each state, the information they provided for themselves was utilized. Where differences in the submitted data exists, the latest submission, the VA submittal, was used. The differences in reported data between the DC, MD, and VA submittals all relate to the timing of the submissions and the date when the 2017 NEI was adopted. The MD submittal was first, and its development preceded the adoption of the 2017 NEI. The DC and VA submittals were submitted after the widespread adoption of the 2017 NEI and considered the 2017 NEI data. The differences in the data between the MD submittal and the DC and VA submittals has been described in the above sections. Tables 2 through 7 of this document present the State's 2017 DC Area BYEI by source category and county. In the State's 2017 DC Area BYEI, the States demonstrate that the biogenic emissions in Table 1 of this document are taken from EPA's 2014 NEI database. As noted in the State's 2017 DC Area BYEI, total biogenic emissions for July 2014 were divided by 31 days to develop average ozone season day emissions for each jurisdiction in the DC Area and then added together to develop the DC Area total.

TABLE 1—2017 DC AREA BYEI SUMMARY

[Tons per ozone season day]

Source category	VOC	NO_X	CO
Point	5.19	79.55	25.13
Quasi-Point	0.39	0.19	0.28
Non-Point	127.88	23.22	74.27
Non-Road Model	37.68	30.87	710.87
MAR	2.05	11.09	19.26
On-Road	49.58	93.42	673.21
Anthropogenic Total	222.76	238.34	1,503.02
Biogenic	442.62	3.67	38.23

TABLE 2—2017 DC AREA BYEI POINT SOURCE EMISSIONS

[Tons per ozone season day]

Jurisdiction	VOC	NO_X	CO
District of Columbia	0.17	0.78	0.52
Calvert County	0.11	2.66	0.88
Charles County	0.32	6.47	2.19
Frederick County	0.76	1.75	1.73
Montgomery County	0.33	13.85	4.32
Prince George's County	0.99	24.68	5.43
Maryland Total	2.51	49.41	14.55
Arlington County	0.02	0.25	0.13
Fairfax County	0.81	10.39	4.04
Fairfax City	0.30	0.01	0.02
Falls Church City.			
Loudoun County	0.71	10.44	3.32
Prince William County	0.52	6.36	2.07
Manassas City	0.13	0.54	0.25
Manassas Park City.			
Alexandria City	0.02	1.37	0.23
Virginia Total	2.51	29.36	10.06
Region Total	5.19	79.55	25.13

Note: There are no point source VOC, NO_X, and CO emissions for the Virginia Independent Cities of Falls Church and Manassas Park.

[41] EPA's Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations—*https://www.epa.gov/sites/default/files/2017-07/documents/ei_guidance_may_2017_final_rev.pdf.*

TABLE 3—2017 DC AREA BYEI QUASI-POINT SOURCE EMISSIONS

[Tons per ozone season day]

Jurisdiction	VOC	NO_X	CO
Prince George's County	0.39	0.19	0.28
Maryland Total	0.39	0.19	0.28
Region Total	0.39	0.19	0.28

Note: Quasi-point sources only exist in the Prince George's County, Maryland. Emissions for these sources were provided by MDE.

TABLE 4—2017 DC BYE NON-POINT SOURCE EMISSIONS

[Tons per ozone season day]

Jurisdiction	VOC	NO_X	CO
District of Columbia	9.61	2.24	2.29
Calvert County	2.33	0.24	3.31
Charles County	4.42	1.05	9.77
Frederick County	7.18	1.27	10.13
Montgomery County	22.70	4.14	4.32
Prince George's County	21.28	3.30	5.84
Maryland Total	57.90	10.00	33.36
Arlington County	4.87	0.88	1.12
Fairfax County	25.96	4.74	7.43
Fairfax City	0.88	0.21	0.34
Falls Church City	0.41	0.09	0.15
Loudoun County	10.56	2.21	15.01
Prince William County	12.36	1.76	12.87
Manassas City	1.18	0.32	0.62
Manassas Park City	0.79	0.11	0.18
Alexandria City	3.35	0.65	0.89
Virginia Total	60.36	10.98	38.62
Region Total	127.88	23.22	74.27

Note: Small discrepancies may result due to rounding.

TABLE 5—2017 DC AREA BYEI NON-ROAD MODEL SOURCE EMISSIONS

[Tons per ozone season day]

Jurisdiction	VOC	NO_X	CO
District of Columbia	1.37	2.06	24.61
Calvert County	0.96	0.58	8.73
Charles County	1.44	1.01	13.78
Frederick County	2.26	1.71	43.10
Montgomery County	8.37	4.63	163.04
Prince George's County	4.81	3.66	92.61
Maryland Total	17.84	11.59	321.26
Arlington County	0.75	2.32	15.73
Fairfax County	9.17	6.48	181.48
Fairfax City	0.32	0.12	6.62
Falls Church City	0.19	0.07	3.86
Loudoun County	4.33	4.74	86.35
Prince William County	2.73	3.07	50.92
Manassas City	0.13	0.10	2.87
Manassas Park City	0.18	0.06	3.63
Alexandria City	0.67	0.26	13.54
Virginia Total	18.47	17.22	365.00
Region Total	37.68	30.87	710.87

Note: Small discrepancies may result due to rounding.

TABLE 6—2017 DC AREA BYEI MAR EMISSIONS

[Tons per ozone season day]

Jurisdiction	VOC	NO_X	CO
District of Columbia	0.13	1.34	0.35
Calvert County	0.05	0.86	0.14
Charles County	0.02	0.02	0.19
Frederick County	0.16	0.84	1.58
Montgomery County	0.05	0.73	0.75
Prince George's County	0.04	0.52	0.52
Maryland Total	0.33	2.96	3.17
Arlington County	0.76	2.38	6.77
Fairfax County	0.03	0.58	0.15
Fairfax City	0.00	0.00	0.00
Falls Church City	0.00	0.00	0.00
Loudoun County	0.72	2.93	7.98
Prince William County	0.02	0.52	0.13
Manassas City	0.03	0.06	0.64
Manassas Park City	0.00	0.00	0.00
Alexandria City	0.01	0.31	0.07
Virginia Total	1.59	6.78	15.75
Region Total	2.05	11.09	19.26

Note: The cities of Fairfax and Falls Church, located within the Commonwealth of Virginia, did not have any 2017 emissions from the MAR category. Small discrepancies may result due to rounding.

TABLE 7—2017 DC AREA BYEI ON-ROAD SOURCE EMISSIONS

[Tons per ozone season day]

Jurisdiction	VOC	NO_X	CO
District of Columbia	3.76	5.63	54.94
Calvert County	1.28	1.81	11.70
Charles County	1.95	3.44	19.05
Frederick County	3.81	9.98	53.15
Montgomery County	8.97	15.78	119.59
Prince George's County	9.36	20.28	135.40
Maryland Total	25.37	51.29	338.89
Arlington County	1.51	1.92	21.97
Fairfax County	10.11	18.41	145.37
Fairfax City.			
Falls Church City.			
Loudoun County	3.10	6.32	41.28
Prince William County	4.55	8.45	57.69
Manassas City.			
Manassas Park City.			
Alexandria City	1.18	1.40	13.07
Virginia Total	20.45	36.50	279.38
Region Total	49.58	93.42	673.21

Note: Fairfax County emissions include on-road emissions from Fairfax City and Falls Church City. Prince William County emissions include on-road emissions from Manassas City and Manassas Park City. Small discrepancies may result due to rounding.

III. Proposed Action

EPA's review of the material included in their submissions indicates that the States base year inventory SIPs meet the base year inventory requirement for the 2015 ozone NAAQS for the DC Area. Therefore, EPA is proposing to approve the DC Area base year inventory SIPs, which were submitted by Maryland on October 7, 2020; the District of Columbia on November 4, 2020; and Virginia on December 11, 2020. EPA is soliciting public comments on the issues discussed in these documents. These comments will be considered before taking final action.

IV. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege

Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts . . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.'' Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998, opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rulemaking, proposing to approve the DC Area base year inventory SIPs for the 2015 ozone NAAQS, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Nitrogen dioxide, Volatile organic compounds.

Dated: February 16, 2022.

Diana Esher,

Acting Regional Administrator, Region III.

[FR Doc. 2022–03863 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2020–0430; FRL–7522–03–OAR]

RIN 2060–AU63

National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On January 11, 2022, the U.S. Environmental Protection Agency (EPA) proposed a rule titled ''National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review.'' The EPA is extending the comment period on this proposed rule that currently closes on February 25, 2022, by 60 days. The comment period will now remain open until April 26, 2022, to allow additional time for Tribal Nations and stakeholders to review and comment on the proposal.

DATES: The public comment period for the proposed rule published in the **Federal Register** on January 11, 2022 (87 FR 1616), originally ending February 25, 2022, is being extended by 60 days. Written comments must be received on or before April 26, 2022.

ADDRESSES: Submit comments, identified by Docket ID No. EPA–HQ–OAR–2020–0430, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.

• *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0430 in the subject line of the message.

• *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0430.

• *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0430, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

• *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions. All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open to the public by appointment only to reduce the risk of transmitting COVID–19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Tonisha Dawson, Metals and Inorganic Chemicals Group, Sector Policies and Programs Division (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–1454 fax number: (919) 541–4991 email address: *dawson.tonisha@epa.gov.*

SUPPLEMENTARY INFORMATION: *Rationale.* Based on consideration of requests received from industry (Freeport-McMoRan Miami, Inc. and Asarco LLC) and an environmental organization (Earthjustice), the EPA is extending the public comment period for an additional 60 days. Therefore, the public comment period will end on April 26, 2022.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2020–0430. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0430. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to *https://www.regulations.gov/* any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

Due to public health concerns related to COVID–19, the Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov,* and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0430. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Penny Lassiter,

Director, Sector Policy and Programs Division.

[FR Doc. 2022–03987 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 49, and 52

[FAR Case 2019–008; Docket No. 2019–0008, Sequence No. 1]

RIN 9000–AN91

Federal Acquisition Regulation: Small Business Program Amendments

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement several changes to the Small Business Administration (SBA) regulations.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before April 25, 2022 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–008 to the Federal eRulemaking portal at *https://www.regulations.gov* by searching for ''FAR Case 2019–008''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2019–008''. Follow the instructions provided on the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2019–008'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR Case 2019–008'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 703–605–2815, or by email at *malissa.jones@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2019–008.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement several revisions that the Small Business Administration (SBA) made to its regulations in its final rule published on November 29, 2019, at 84 FR 65647. SBA provided an explanation of the changes in its final rule preamble. The revisions address the following topics:

- The point in the procurement process at which small business size status is determined for offers for multiple-award contracts.
- A new ground for a socioeconomic status protest.
- The eligibility requirements for 8(a) participants under long-term contracts (*i.e.,* contracts with a duration of more than 5 years).
- The small business size standard for information technology value-added resellers under North American Industry Classification System (NAICS) code 541519.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Small Business Size Standards

Part 19 is proposed to be revised to clarify SBA policy concerning size standards in three areas. First, while SBA generally determines small business size standards at the time of initial offer including price, for a multiple-award contract that does not require offers for the contract to include price, SBA will determine size as of the date of the initial offer for the multiple-award contract, whether or not the offer includes price or the price is evaluated; changes are made at FAR 19.102 and 19.301–1. This proposed rule merely informs contracting officers of SBA's policy on determinations of size status; it does not include guidance for contracting officers regarding solicitations that do not include price as an evaluation factor for multiple-award contracts. FAR case 2017–010, Evaluation Factors for Multiple-Award Contracts, and FAR case 2018–014, Increasing Task-order Level Competition, provide this guidance.

Second, an information technology value-added reseller under NAICS code 541519, proposing to furnish an end product it did not manufacture (*i.e.,* a ''nonmanufacturer''), is a small business if it has no more than 150 employees. This size standard is implemented at FAR 19.505; FAR 52.204–8, Annual Representations and Certifications and its Alternate I; FAR 52.212–1, Instructions to Offerors—Commercial Items; FAR 52.219–1, Small Business Program Representations and its Alternate II; and FAR 52.219–28, Post-Award Small Business Program Rerepresentation.

Third, adding new grounds for a socioeconomic status protest based on an allegation that a contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract (the ''ostensible subcontractor rule''). Changes are made at FAR 19.306 to 19.308.

B. Setting Aside Orders Under Multiple-Award Contracts That Were Set Aside for Small Business

FAR 19.504 is proposed to be revised to clarify that, if a multiple-award contract was totally set aside for small business, contracting officers may set aside orders under that contract for any of the small business socioeconomic programs. This subpart further clarifies that for these orders to be set aside, the rule of two and the specific socioeconomic program eligibility requirements must be met.

C. Determining Eligibility for the 8(a) Program

Subpart 19.8 is proposed to be revised to specify that SBA designates concerns as 8(a) participants in the Dynamic Small Business Search (DSBS) at *https://web.sba.gov/pro-net/search/dsp_dsbs.cfm* and that SBA's designation also appears in the System for Award Management (SAM). In addition, for 8(a) contracts exceeding 5 years, including options, contracting officers are required to verify in DSBS or SAM that the concern is an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the concern is not an SBA-certified 8(a) participant at that time, contracting officers shall not exercise the option.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule proposes to amend several clauses. However, this proposed rule does not impose any new requirements on contracts at or below the SAT, for commercial products including commercially available off-the-shelf (COTS) items, or for commercial services. The clauses continue to apply to acquisitions at or below the SAT, to acquisitions for commercial products including commercially available off-the-shelf (COTS) items, and to acquisitions for commercial services.

IV. Expected Impact of the Rule

This proposed rule will impact the operations of the Government and contractors as described in this section.

This proposed rule will impact contracting officers for long-term 8(a) contracts. These contracting officers will not be able to exercise options past the fifth year of long-term 8(a) contracts if the 8(a) contractor no longer qualifies for the 8(a) program.

Contractors who are 8(a) participants with long-term contracts may find that the Government cannot exercise an option on that contract, if the contractor is no longer eligible for the 8(a) program.

Offerors who are information technology value-added resellers should be able to understand more easily the size standard that applies to them.

This proposed rule is not expected to result in any costs to contractors or offerors.

The ''ostensible subcontractor rule'' is implemented in this proposed rule as a new ground for protest. Small business contractors must not be overly reliant on non-similarly situated small business subcontractors or have such a subcontractor perform primary and vital requirements of the contract. This means the contractor must have the necessary expertise within its own organization.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the ''Submission of Federal Rules Under the Congressional Review Act'' form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This proposed rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement several revisions made to the SBA regulations in SBA's final rule published on November 29, 2019 (84 FR 65647). The revisions address the point in the procurement process at which small business size status is determined for offers for multiple-award contracts. SBA generally determines size status at the time of initial offer including price. However, for a solicitation for a multiple-award contract that does not require offers to include price, SBA will determine size as of the date of initial offer, whether or not the offer includes price or the price is evaluated. The revisions also address the eligibility requirements for 8(a) participants under long-term contracts (*i.e.,* with a duration of more than five years including option periods). For long-term 8(a) contracts, contracting officers will be required to verify in the Dynamic Small Business Search (DSBS) or the System for Award Management (SAM) that the contractor is still an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the contractor is no longer an SBA-certified 8(a) participant, the contracting officer shall not exercise the option. In addition, SBA's revisions specified that the size standard for information technology value-added resellers under North American Industry Classification System (NAICS) code 541519 is 150 employees. The revisions also address SBA's new grounds for a socioeconomic status protest based on an allegation that a contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract (the ''ostensible subcontractor rule''). This proposed FAR rule includes all of these revisions.

The objective of this proposed rule is to implement SBA's regulatory revisions in the FAR. The legal basis for this rule is 41 U.S.C. 1303 and the SBA regulatory changes at 13 CFR 121.103(h), 13 CFR 121.404, 13 CFR 121.406, 13 CFR 124.521(e), and 13 CFR 125.2(e).

This proposed rule will apply to small entities that do business with the Federal Government. According to the data in SAM, 320,622 of the active entity registrations are for entities that are small business concerns for at least one NAICS code. The proposed FAR changes, regarding the point at which SBA determines size status and SBA's new grounds for a socioeconomic protest, will provide these entities with straightforward guidance that will reduce confusion and uncertainty.

The proposed changes regarding long-term 8(a) contracts will impact 8(a) participants who are Federal contractors with contracts that have a duration of more than five years, including options. An analysis of the data in the Federal Procurement Data System (FPDS) indicates that, for fiscal years 2017 through 2019, an average of 257 long-term contracts (greater than five years) were awarded to 227 unique entities each year under the 8(a) program. The proposed change may serve to reduce the number of long-term contracts awarded to 8(a) participants by agencies that are concerned about having a contract in place beyond the fifth year. Contracts outside the 8(a) program will not have such obstacles to continued performance.

The proposed change regarding the size standard for information technology value-added resellers will affect such resellers who do business with the Federal Government. An analysis of the data in FPDS shows that, for fiscal years 2017 through 2019, an average of 727 unique large business entities and 1,347 unique small business concerns were awarded contracts each year under NAICS code 541519.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2019–008), in correspondence.

VIII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Parts 19, 49, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose to amend 48 CFR parts 19, 49, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 49, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.102 by—
■ a. Revising the last sentence of paragraph (a)(1); and
■ b. Adding paragraphs (a)(3) and (4).

The revision and additions read as follows:

19.102 Small business size standards and North American Industry Classification System codes.

(a) * * *

(1) * * * They are also available at *https://www.sba.gov/document/support--table-size-standards.*

* * * * *

(3) SBA determines the size status of a concern, including its affiliates, as of the date the concern represents that it is small to the contracting officer as part of its initial offer, which includes price.

(4) When an agency uses a solicitation for a multiple-award contract that does not require offers for the contract to include price, SBA determines size as of the date of initial offer for the multiple-award contract, whether or not the offer includes price or the price is evaluated. (See 13 CFR 121.404(a)(1)(iv).)

* * * * *

19.301–1 [Amended]

■ 3. Amend section 19.301–1 by—
■ a. Removing from paragraph (b) introductory text the phrase ''initial offer'' and adding ''initial offer, (whether or not the offer includes price or the price is evaluated)'' in its place; and
■ b. Removing from paragraph (e)(1) the phrase ''offer for the contract'' and adding ''offer for the contract (whether or not the offer includes price or the price is evaluated (see 13 CFR 121.404(a)(1)(iv)),'' in its place.
■ 4. Amend section 19.306 by—
■ a. Removing from the end of paragraph (d)(1)(ii) the word ''or'';
■ b. Removing from the end of paragraph (d)(1)(iii) the period and adding ''; or'' in its place; and
■ c. Adding paragraph (d)(1)(iv).

The addition reads as follows:

19.306 Protesting a firm's status as a HUBZone small business concern.

* * * * *

(d) * * *

(1) * * *

(iv) For HUBZone set-aside or sole-source service contracts, a HUBZone prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the ''ostensible subcontractor rule'').

* * * * *

■ 5. Amend section 19.307 by—
■ a. Removing from paragraph (d)(1) introductory text the phrase ''service disabled'' and adding ''service–disabled'' in its place;
■ b. Removing from paragraph (d)(1)(i) the text ''service disabled'' and ''125.8; or'' and adding ''service-disabled'' and ''125.11;'' in their places, respectively;
■ c. Removing from paragraph (d)(1)(ii) the period at the end and adding ''; or'' in its place; and
■ d. Adding paragraph (d)(1)(iii).

The addition reads as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

* * * * *

(d) * * *

(1) * * *

(iii) For set-aside or sole-source service contract ostensible subcontractor protests, the protester presents credible evidence of the alleged undue reliance on a small, non-similarly situated entity subcontractor, or credible evidence that the small non-similarly situated entity is performing the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the ''ostensible subcontractor rule'').

* * * * *

■ 6. Amend section 19.308 by—
■ a. Removing from the end of paragraph (d)(1)(i) the word ''or'';
■ b. Removing from the end of paragraph (d)(1)(ii) the period and adding ''; or'' in its place; and
■ c. Adding paragraph (d)(1)(iii).

The addition reads as follows:

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

* * * * *

(d) * * *

(1) * * *

(iii) For WOSB or EDWOSB set-aside or sole-source service contracts, the protest presents evidence that the prime contractor is unusually reliant on a small, non-similarly situated entity subcontractor, as defined in 13 CFR 125.1, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the ''ostensible subcontractor rule'').

* * * * *

■ 7. Amend section 19.504 by—
■ a. Removing from paragraph (b) heading the word ''*partial*'';
■ b. Redesignating paragraphs (b)(1) and (b)(2) as paragraphs (b)(2)(i) and (b)(2)(ii), respectively;
■ c. Adding a new paragraph (b)(1); and
■ d. Adding a heading for newly redesignated paragraph (b)(2).

The additions read as follows:

19.504 Orders under multiple-award contracts.

* * * * *

(b) * * *—(1) *Orders under total set-aside contracts.* Under a total small business set-aside, contracting officers may at their discretion set aside orders for any of the small business socioeconomic concerns identified in 19.000(a)(3) provided that the requirements at paragraph (a) of this section, 19.502–2(b), and the specific program eligibility requirements are met.

(2) *Orders under partial set-aside contracts.* * * *

* * * * *

19.505 [Amended]

■ 8. Amend section 19.505 by removing from paragraphs (c)(1)(ii) and (c)(2)(i) the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519'' in its place.

■ 9. Amend section 19.802 by adding two sentences at the end to read as follows:

19.802 Determining eligibility for the 8(a) program.

* * * SBA designates the concern as an 8(a) participant in the Dynamic Small Business Search (DSBS) at *https://web.sba.gov/pro-net/search/dsp_dsbs.cfm.* SBA's designation also appears in the System for Award Management (SAM).

■ 10. Amend section 19.804–1 by—
■ a. Removing from the end of paragraph (a)(1) the word ''and'';
■ b. Redesignating paragraph (a)(2) as paragraph (a)(3); and
■ c. Adding a new paragraph (a)(2).

The addition reads as follows:

19.804–1 Agency evaluation.

(a) * * *

(2) Length of contract, including option periods (see 19.812(d)); and

* * * * *

■ 11. Amend section 19.812 by—
■ a. Redesignating paragraph (d) as paragraph (e); and
■ b. Adding a new paragraph (d).

The addition reads as follows:

19.812 Contract administration.

* * * * *

(d) For 8(a) contracts exceeding 5 years including options, the contracting officer shall verify in DSBS or SAM that the concern is an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the concern is not an SBA-certified 8(a) participant, the contracting officer shall not exercise the option (see 13 CFR 124.521(e)(2)).

* * * * *

PART 49—TERMINATION OF CONTRACTS

49.402–3 [Amended]

■ 12. Amend section 49.402–3 by removing from paragraph (e)(4) the phrase ''Small Business Administration Regional'' and adding ''Small Business Administration Area'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 52.204–8 by—
■ a. Revising the date of the provision;
■ b. Removing from paragraph (a)(3) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place;
■ c. In Alternate I:
■ i. Revising the date of Alternate I; and
■ ii. Removing from paragraph (a)(2) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revisions read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (DATE)

* * * * *

Alternate I (DATE). * * *

* * * * *

■ 13. Amend section 52.212–1 by—
■ a. Revising the date of the provision; and
■ b. Removing from paragraph (a) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revision reads as follows:

52.212–1 Instructions to Offerors—Commercial Products and Commercial Services.

* * * * *

Instructions to Offerors—Commercial Products and Commercial Services (DATE)

* * * * *

■ 14. Amend section 52.212–5 by—
■ a. Revising the date of the provision; and
■ b. Removing from paragraph (b)(22)(i) the date ''(SEP 2021)'' and adding ''(DATE)'' in its place.

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (DATE)

* * * * *

■ 15. Amend section 52.219–1 by—
■ a. Revising the date of the provision;
■ b. Removing from paragraph (b)(3) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place;
■ c. In Alternate II:
■ i. Revising the date of Alternate II; and
■ ii. Removing from paragraph (b)(2) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (DATE)

* * * * *

Alternate II (DATE) * * *

* * * * *

■ 16. Amend section 52.219–18 by—
■ a. Revising the date of Alternate I; and
■ b. Removing from paragraph (a)(3) of Alternate I the phrase ''*Regional Office(s)*'' and adding ''*Area Office(s)*'' in its place.

The revision reads as follows:

52.219–18 Notification of Competition Limited to Eligible 8(a) Participants.

* * * * *

Alternate I (DATE) * * *

* * * * *

■ 17. Amend section 52.219–28 by—
■ a. Revising the date of the provision; and

■ b. Removing from paragraph (e) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revision reads as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (DATE)

* * * * *

[FR Doc. 2022–03105 Filed 2–23–22; 8:45 am]

BILLING CODE 6820–EP–P

Notices

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the North Carolina Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the North Carolina Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a virtual debrief via Webex at 12:00 p.m. ET on Friday, March 18, 2022, to discuss the March 15, 2022, web briefing on Legal Financial Obligations in the state.

DATES: The meeting will take place on Friday, March 18, 2022, at 12:00 p.m. ET.

ADDRESSES:

Online Registration (Audio/Visual): https://tinyurl.com/bdzh5sxs.

Telephone (Audio Only): Dial (800) 360–9505 USA Toll Free; Access code: 2760 596 8002.

FOR FURTHER INFORMATION CONTACT: Victoria Moreno, DFO, at *vmoreno@usccr.gov* or (434) 515–0204.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the conference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Individuals who are deaf, deafblind, and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at (800) 877–8339 and providing the Service with the conference details found through registering at the web link above. To request additional accommodations, please email *vmoreno@usccr.gov* at least ten (10) days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Liliana Schiller at *lschiller@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, North Carolina Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at the above phone number.

Agenda

I. Welcome & Roll Call
II. Panel Debrief
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: Friday, February 17, 2022.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2022–03860 Filed 2–23–22; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–04–2022]

Foreign-Trade Zone (FTZ) 177—Evansville, Indiana; Notification of Proposed Production Activity; AstraZeneca Pharmaceuticals, LP; (Pharmaceutical Products); Mount Vernon, Indiana

AstraZeneca Pharmaceuticals, LP submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Mount Vernon, Indiana within Subzone 177A. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on February 14, 2022.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status materials and specific finished products described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.* The proposed finished products and materials would be added to the production authority that the Board previously approved for the operation, as reflected on the Board's website.

The proposed finished products include: ARIMIDEX (anastrozole) tablets; BRILINTA (ticagrelor) tablets; CRESTOR (rosuvastatin calcium) tablets; LYNPARZA (olaparib) tablets; SEROQUEL IR (quetiapine fumarate) tablets; and, SEROQUEL XR (quetiapine fumarate) tablets (duty-free).

The proposed foreign-status materials include: Anastrozole active pharmaceutical ingredient (API); microcrystalline cellulose; olaparib API; quetiapine fumarate API; rosuvastatin calcium API; and, ticagrelor API (duty rate ranges from 5.2% to 6.5%). The request indicates that olaparib API and ticagrelor API are subject to duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is April 5, 2022.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Christopher Wedderburn at *Chris.Wedderburn@trade.gov.*

Dated: February 17, 2022.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2022–03896 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–970]

Multilayered Wood Flooring From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Antidumping Duty Administrative Review; Notice of Amended Final Results

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On February 7, 2022, the U.S. Court of International Trade (CIT or Court) issued its final judgment in *Fine Furniture (Shanghai) Limited, et al.* v. *United States,* Consol. Court No. 14–00135, sustaining the Department of Commerce (Commerce)'s remand redetermination pertaining to the 2011–2012 antidumping duty (AD) administrative review of multilayered hardwood flooring (wood flooring) from the People's Republic of China (China) covering the period May 26, 2011, through November 30, 2012. Commerce is notifying the public that the CIT's final judgment in this litigation is not in harmony with the final of the 2011–2012 AD administrative review of wood flooring from China, and that Commerce is amending the final results of that review with respect to the dumping margin assigned to certain separate rate companies.

DATES: Applicable February 17, 2022.

FOR FURTHER INFORMATION CONTACT: Drew Jackson, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4406.

SUPPLEMENTARY INFORMATION:

Background

On May 9, 2014, Commerce published the final results of the first administrative review of wood flooring from China.[1] After correcting certain ministerial errors contained in the *Final Results,* on June 20, 2014, Commerce published the *Amended Final Results,* in which Commerce amended the final weighted-average dumping margins for Fine Furniture (Shanghai) Limited (Fine Furniture) and certain separate rate companies.[2]

Fine Furniture and certain separate rate companies (collectively, plaintiffs) challenged Commerce's *Final Results.* In its first remand opinion, the CIT held unlawful the calculation of a deduction Commerce made for Chinese irrecoverable value-added tax (VAT).[3] Furthermore, the CIT held two decisions Commerce made in determining the normal value of Fine Furnitures's subject merchandise were not supported by substantial evidence: (1) Commerce's choice of financial statements for use in calculating surrogate financial ratios; and (2) the calculation of the surrogate value for electricity.[4]

Commerce filed the first remand redetermination on August 28, 2017, which included a recalculation of the weighted-average dumping margin of 0.73 percent for Fine Furniture. Based on this margin, Commerce assigned a rate of 0.73 percent as the revised separate rate.[5] The CIT sustained Commerce's recalculation of the deduction for VAT and its decisions on the choice of financial statements; however, the CIT ordered Commerce to reconsider on remand its selection of the surrogate value for Fine Furniture's electricity usage.[6]

Following the CIT's opinion and order in *Fine Furniture III,* the court stayed the case pending the outcome of *Changzhou Hawd.*[7] On February 2, 2021, following the U.S. Court of Appeals of the Federal Circuit (Federal Circuit or CAFC) final opinion in *Changzhou Hawd* that held that Fine Furniture was excluded from the *Order,*[8] the CIT lifted the stay and granted Commerce's voluntary remand to recalculate an antidumping duty rate applicable to the separate rate respondents, given Fine Furniture's exclusion from the order.[9]

In its final remand redetermination, issued in July 2021, Commerce assigned a new separate rate of 0.00 percent applicable only to those companies that are party to the litigation and that have an injunction in place.[10] The CIT sustained Commerce's final remand redetermination.[11]

Timken Notice

In its decision in *Timken,*[12] as clarified by *Diamond Sawblades,*[13] the Federal Circuit held that, pursuant to section 516A(c) and (e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of a court decision that is not "in harmony" with a Commerce determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's February 7, 2022, judgment constitutes a final court decision that is not in harmony with Commerce's *Final Results.* Thus, this notice is published in fulfillment of the publication requirements of *Timken.*

Amended Final Results

Because there is now a final court judgment, Commerce is amending its *Final Results* with respect to the dumping margin assigned to entries of wood flooring produced and/or exported from China, which were entered or withdrawn from warehouse, for consumption during the period May 26, 2011, through November 30, 2012, for the separate rate companies listed in the appendix.[14] The amended weighted-average dumping margin for the companies that participated in the

---

[1] *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review;* 2011–2012, 79 FR 26712 (May 9, 2014) (*Final Results*), and accompanying Issues and Decision Memorandum.

[2] *See Multilayered Wood Flooring from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2011–2012,* 79 FR 35314 (June 20, 2014) (*Amended Final Results*).

[3] *See Fine Furniture (Shanghai) Ltd.* v. *United States,* 182 F. Supp 3d 1350 (CIT 2016) (*Fine Furniture I*).

[4] *Id.*

[5] *See* Final Results of Redetermination Pursuant to Court Order (August 28, 2017), ECF No. 337–1, 338–1.

[6] *See Fine Furniture (Shanghai) Ltd.* v. *United States,* 321 F. Supp. 3d 1282 (CIT 2018) (*Fine Furniture III*).

[7] *See Changzhou Hawd Flooring Co., Ltd.* v. *United States,* 947 F.3d 781 (Fed. Cir. 2020) (*Changzhou Hawd*).

[8] *See Changzhou Hawd,* 947 F.3d at 793–94.

[9] *See Fine Furniture (Shanghai) Limited, et al.* v. *United States,* Consol. Court No. 14–00135, Slip Op. 21–69 (June 2, 2021) (*Fine Furniture IV*).

[10] *See* Final Results of Remand Redetermination, *Fine Furniture (Shanghai) Limited, et al.* v. *United States,* Consol. Court No. 14–00135, Slip Op. 21–69 (CIT June 2, 2021) (July 12, 2021).

[11] *See Fine Furniture (Shanghai) Limited, et al.* v. *United States,* Consol. Court No. 14–00135, Slip Op. 22–9 (CIT February 7, 2022).

[12] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[13] *See Diamond Sawblades Manufacturers Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond* Sawblades).

[14] Hangzhou Zhengtian Industrial Co., Ltd. was not subject to the first review final results. *See Final Results.* Therefore, this company's entries would have liquidated pursuant to prior liquidation instructions. In addition, Dalian Huilong Wooden Products Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Karly Wood Product Limited, and Kunshan Yingyi-Nature Wood Industry Co., Ltd. have no outstanding injunction for this period of review. Therefore, in accordance with our final remand redetermination and the Court's opinion, we are not assigning these companies the revised rate.

litigation and have injunctions in place is 0.00 percent.[15]

Cash Deposit Requirements

Because the companies listed in the appendix have a superseding cash deposit rate, *i.e.,* there have been final results published in subsequent administrative reviews for the companies listed above, we will not issue revised cash deposit instructions to U.S. Customs and Border Protection (CBP). This notice will not affect the current cash deposit rates for those exporters/producers.

Liquidation of Suspended Entries

At this time, Commerce remains enjoined by CIT order from liquidating entries of subject merchandise that were exported by any of the companies listed above and that were entered into the United States, or withdrawn from warehouse, for consumption during the period May 26, 2011, through November 30, 2012. These entries will remain enjoined pursuant to the terms of the injunction during the pendency of any appeals process.

In the event the CIT's ruling is not appealed, or, if appealed, upheld by a final and conclusive court decision, Commerce intends to instruct CBP to assess antidumping duties on unliquidated entries of subject merchandise exported by the companies listed above in accordance with 19 CFR 351.212(b). We will instruct CBP to assess antidumping duties on all appropriate entries covered by the review when the importer-specific *ad valorem* assessment rate is not zero or *de minimis.* Where an importer-specific *ad valorem* assessment rate is zero or *de minimis,*[16] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e), 751(a)(1), and 777(i)(1) of the Act.

Dated: February 17, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Separate Rate Companies[17]

1. Dalian Kemian Wood Industry Co., Ltd.
2. Dongtai Fuan Universal Dynamics, LLC
3. GTP International Limited
4. Guangzhou Panyu Kangda Board Co., Ltd.
5. Guangzhou Panyu Southern Star Co., Ltd.
6. Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.
7. Jiangsu Simba Flooring Co., Ltd.
8. Jiashan HuiJiaLe Decoration Material Co., Ltd.
9. Kemian Wood Industry (Kunshan) Co., Ltd.
10. Puli Trading Ltd.
11. Shenzhenshi Huanwei Woods Co., Ltd.
12. Suzhou Dongda Wood Co., Ltd.
13. Zhejiang Fudeli Timber Industry Co., Ltd.
14. Shanghai Lizhong Wood Products Co., Ltd./The Lizhong Wood Industry Limited Company of Shanghai
15. Metropolitan Hardwood Floors, Inc.
16. Baishan Huafeng Wood Product Co., Ltd.
17. Dalian Dajen Wood Co., Ltd.
18. Dalian Penghong Floor Products Co., Ltd.
19. Dasso Industrial Group Co., Ltd.
20. Dunhua City Hongyuan Wood Industry Co., Ltd.
21. Dunhua City Wanrong Wood Industry Co., Ltd.
22. Fujian Wuyishan Werner Green Industry Co., Ltd.
23. Fusong Jinlong Wooden Group Co., Ltd.
24. Hangzhou Hanje Tec Co., Ltd.
25. Hunchun Forest Wolf Wooden Industry Co., Ltd.
26. Huzhou Chenghang Wood Co., Ltd.
27. Huzhou Fulinmen Imp. & Exp. Co., Ltd.
28. Jiafeng Wood (Suzhou) Co., Ltd.
29. Jilin Forest Industry Jinqiao Flooring Group Co., Ltd.
30. Mudanjiang Bosen Wood Industry Co., Ltd.
31. Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd.
32. Shanghai Eswell Timber Co., Ltd.
33. Shanghai Shenlin Corporation
34. Xuzhou Shenghe Wood Co., Ltd.
35. Zhejiang Fuma Warm Technology Co., Ltd.
36. Zhejiang Shiyou Timber Co., Ltd.

[FR Doc. 2022–03923 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–DS–P

[15] *Id.; see also* Appendix.

[16] *See* 19 CFR 351.106(c)(2).

[17] As noted above, Hangzhou Zhengtian Industrial Co., Ltd. was not subject to the first review final results. *See Final Results.* Therefore, this company's entries would have liquidated pursuant to prior liquidation instructions. In addition, Dalian Huilong Wooden Products Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Karly Wood Product Limited, and Kunshan Yingyi-Nature Wood Industry Co., Ltd. have no outstanding injunction for this period of review. Therefore, in accordance with our final remand redetermination and the Court's opinion, we are not providing these companies with the revised rate.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–829]

Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No-Shipments; 2019–2020; Correction

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) published a notice in the **Federal Register** on February 8, 2022, in which Commerce announced the final results of the 2019–2020 administrative review of the antidumping duty (AD) order on steel concrete reinforcing bar (rebar) from the Republic of Turkey (Turkey). This notice corrects the name of the respondent for which we tied the rates for non-selected companies to in that determination.

DATES: Applicable February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Robert Copyak or Jose Rivera, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3642 or (202) 482–0842, respectively.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of February 8, 2022, in the FR Doc 2022–02638 on page 7119, in the second column, correct the last sentence in the section ''Rates for Non-Selected Companies:'' ''Accordingly, Commerce is assigning Colakoglu's rate of 1.02 percent to companies not selected for individual examination.'' The corrected sentence should read: ''Accordingly, Commerce is assigning Kaptan Demir's rate of 1.02 percent to companies not selected for individual examination.''

Background

On August 6, 2021, Commerce published in the **Federal Register** the notice of the final results of the 2019–2020 administrative review.[1] We inadvertently misstated in the ''Rates for Non-Selected Companies'' section of the notice that ''Commerce is assigning Colakoglu's rate of 1.02 percent to companies not selected for individual examination.'' The correct rate for non-selected companies is the rate calculated for Kaptan Demir Celik Energji Tersane ve Ulasim Sanayi A.S. (Kaptan Demir) of 1.02 percent. This notice serves as a notification of this correction to the **Federal Register** notice published on February 8, 2022.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a) and 777(i) of the Act.

[1] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020,* 87 FR 7118 (February 8, 2022).

Dated: February 17, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–03922 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–843, A–580–829, A–583–828]

Stainless Steel Wire Rod From Japan, the Republic of Korea, and Taiwan: Continuation of the Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) orders on stainless steel wire rod (SSWR) from Japan, the Republic of Korea (Korea), and Taiwan would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD orders.

DATES: Applicable February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher Williams or Minoo Hatten, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5166 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 15, 1998, Commerce published in the **Federal Register** the AD orders on SSWR from Japan, Korea, and Taiwan.[1] On July 1, 2021, Commerce initiated,[2] and the ITC instituted,[3] sunset reviews of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).

As a result of its reviews, Commerce determined, pursuant to sections 751(c)(1) and 752(c) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of dumping. Commerce, therefore, notified the ITC of the magnitude of the margins of dumping rates likely to prevail should these *Orders* be revoked.[4]

On February 16, 2022, the ITC published its determination that revocation of the *Orders* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to sections 751(c) and 752(a) of the Act.[5]

Scope of the Orders

The merchandise covered by the *Orders* is SSWR, which comprises products that are hot-rolled or hot-rolled annealed and/or pickled and/or descaled rounds, squares, octagons, hexagons or other shapes, in coils, that may also be coated with a lubricant containing copper, lime or oxalate. SSWR is made of alloy steels containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. These products are manufactured only by hot-rolling or hot rolling annealing, and/or pickling and/or descaling, are normally sold in coiled form, and are of solid cross-section. The majority of SSWR sold in the United States is round in cross-sectional shape, annealed and pickled, and later cold finished into stainless steel wire or small-diameter bar. The most common size for such products is 5.5 millimeters or 0.217 inches in diameter, which represents the smallest size that normally is produced on a rolling mill and is the size that most wire-drawing machines are set up to draw. The range of SSWR sizes normally sold in the United States is between 0.20 inches and 1.312 inches in diameter.

Two stainless steel grades are excluded from the scope of the *Orders.* SF20T and K–M35FL are excluded. The chemical makeup for the excluded grades is as follows:

SF20T

Carbon 0.05 max
Manganese 2.00 max
Phosphorous 0.05 max
Sulfur 0.15 max
Silicon 1.00 max
Chromium 19.00/21.00
Molybdenum 1.50/2.50
Lead-added (0.10/0.30)
Tellurium-added (0.03 min)

K–M35FL

Carbon 0.015 max
Silicon 0.70/1.00
Manganese 0.40 max
Nickel 0.30 max
Chromium 12.50/14.00
Lead 0.10/0.30
Phosphorous 0.04 max
Sulfur 0.03 max
Aluminum 0.20/0.35

The products subject to the *Orders* are currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0030, 7221.00.0045, and 7221.00.0075 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Orders* is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year (sunset) reviews of the *Orders* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to APO of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO which may be subject to sanctions.

[1] *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Wire Rod from Korea,* 63 FR 49331 (September 15, 1998); *see also Notice of Antidumping Duty Order: Stainless Steel Wire Rod from Japan,* 63 FR 49328 (September 15, 1998); and *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Wire Rod from Taiwan,* 63 FR 49332 (September 15, 1998) (collectively, *Orders*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 86 FR 35070 (July 1, 2021).

[3] *See Stainless Steel Wire Rod from Japan, Korea, and Taiwan; Institution of a Five-Year Review,* 86 FR 35124 (July 1, 2021).

[4] *See Stainless Steel Wire Rod from Japan, the Republic of Korea, and Taiwan: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders,* 86 FR 56249 (October 8, 2021), and accompanying Issues and Decision Memorandum (IDM).

[5] *See Stainless Steel Wire Rod from Japan, South Korea, and Taiwan; Determinations, Inv. Nos. 731–TA–771–772 and 775 (Fourth Review),* 87 FR 8878 (February 16, 2022), *see also* USITC Pub. 5279 (February 2022).

Notification to Interested Parties

These five-year sunset reviews and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: February 17, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–03894 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–842]

Large Residential Washers From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2020–2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that large residential washers (washers) from Mexico were not sold in the United States at less than normal value (NV) during the period of review (POR) February 1, 2020, through January 31, 2021.

DATES: Applicable February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Tara Moran, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3619.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2021, based on a timely request for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review on washers from Mexico.[1] This review covers one producer/exporter of the subject merchandise, Electrolux Home Products Corp. N.V. and Electrolux Home Products de Mexico, S.A. de C.V. (collectively, Electrolux). For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[2]

Scope of the Order

The products covered by the order are all large residential washers and certain subassemblies thereof from Mexico. For a complete description of the scope of the order, *see* the Preliminary Decision Memorandum.[3]

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margin exists for the respondent for the period February 1, 2020, through January 31, 2021:

Producer/exporter	Weighted-average dumping margin (percent)
Electrolux	0.00

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.[4] Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[5] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the time limit for filing case briefs.[6] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[7] Case and rebuttal briefs should be filed using ACCESS.[8] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information.[9]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS within 30 days after the date of publication of this notice.[10] Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing.[11]

An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline. Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless otherwise extended.[12]

Assessment Rates

Upon completion of the administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.[13] If the weighted average dumping margin for Electrolux is not zero or *de minimis* (*i.e.,* less than 0.5 percent), we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales to the total entered value of those same sales in accordance with 19 CFR

---

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 17129 (April 1, 2021).

[2] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2020–2021 Administrative Review of the Antidumping Duty Order on Large Residential Washers from Mexico,'' dated concurrently with this notice.

[3] *Id.* at 2.

[4] *See* 19 CFR 351.224(b).

[5] *See* 19 CFR 351.309(c).

[6] Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

[7] *See* 19 CFR 351.309(c)(2) and (d)(2).

[8] *See* 19 CFR 351.303.

[9] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[10] *See* 19 CFR 351.310(c).

[11] *See* 19 CFR 351.310(d).

[12] *See* section 751(a)(3)(A) of the Act.

[13] *See* 19 CFR 351.212(b).

351.212(b)(1). If the weighted-average dumping margin for Electrolux is zero or *de minimis* in the final results, or an importer-specific assessment rate is zero or *de minimis* in the final results, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Commerce intends to issue instructions to CBP 41 days after the publication date of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the exporter listed above will be equal to the weighted-average dumping margin established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for companies not participating in this review, the cash deposit rate will continue to be the company-specific cash deposit rate published for the most recently completed segment; (3) if the exporter is not a firm covered in this review, or the original less-than-fair-value (LTFV) investigation, but the producer is, then the cash deposit rate will be the cash deposit rate established for the most recently completed segment for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 36.52 percent, the all-others rate established in the LTFV investigation.[14] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

[14] *See Large Residential Washers from Mexico: Antidumping Duty Orders,* 78 FR 11148 (February 15, 2013).

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 16, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Product Comparisons
VI. Constructed Export Price
VII. Normal Value
VIII. Currency Conversion
IX. Recommendation

[FR Doc. 2022–03895 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB824]

Marine Mammals; File No. 26269

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Changqun Zhang, Texas A&M University at Galveston, 200 Seawolf Parkway, Galveston, TX 77553, has applied in due form for a permit to import finless porpoises (*Neophocaena asiaeorientalis sunameri*) parts for scientific research.

DATES: Written, telefaxed, or email comments must be received on or before March 28, 2022.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 26269 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 26269 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Shasta McClenahan, Ph.D. (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant proposes to import teeth from 19 finless porpoises for age analysis. These animals were incidentally killed during fishing operations and were recovered by the Institute of Hydrobiology, Chinese Academy of Science. A permit is requested for a duration of three years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: February 17, 2022.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–03893 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB837]

Marine Mammals; File No. 25843

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Peggy Stap, Marine Life Studies, 6 Carlton Drive, Del Rey Oaks, CA 93940, has applied in due form for a permit to conduct research on marine mammals.

DATES: Written, telefaxed, or email comments must be received on or before March 28, 2022.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 25843 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 25843 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Shasta McClenahan, Ph.D. or Erin Markin, Ph.D., (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The applicant proposes to conduct research to (1) develop a baseline genetic database for three odontocete species; (2) study foraging strategies; and (3) investigate the abundance, distribution, movement, and occurrence of cetacean species within coastal and offshore waters of California and Oregon. Up to 25 species of cetaceans may be taken during research including the following ESA-listed species or distinct population segments (DPS): blue (*Balaenoptera musculus*), fin (*B. physalus*), gray (Western North Pacific DPS; *Eschrichtius robustus*), humpback (Mexico and Central America DPSs; *Megaptera novaeangliae*), killer (Southern Resident DPS; *Orcinus orca*), North Pacific right (*Eubalaena japonica*), sei (*B. borealis*), and sperm (*Physeter macrocephalus*) whales. Cetaceans may be taken during vessel surveys including unmanned aircraft systems for counts, above water and underwater photography and videography, photo-identification, photogrammetry, behavioral observations, passive acoustic recording, echosounder for prey mapping, and non-invasive genetic sampling (exhaled air, remote skin swab, sloughed skin, and feces). Five species of pinnipeds, including ESA threatened Guadalupe fur seals (*Arctocephalus townsendi*), may be unintentionally harassed during research activities. See the application for complete numbers of animals requested by species and procedure. The permit is requested for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: February 18, 2022.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–03919 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB831]

Atlantic Coastal Fisheries Cooperative Management Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS, has made a preliminary determination that an Exempted Fishing Permit application contains all of the required information and warrants further consideration. The Exempted Fishing Permit would allow commercial fishing vessels to fish outside fishery regulations in support of research conducted by the applicant. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Coastal Fisheries Cooperative Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed Exempted Fishing Permits.

DATES: Comments must be received on or before March 11, 2022.

ADDRESSES: You may submit written comments by the following method:

- *Email: nmfs.gar.efp@noaa.gov.* Include in the subject line ''AOLA Larval Lobster EFP.''

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, *Laura.Deighan@noaa.gov,* (978) 281–9184.

SUPPLEMENTARY INFORMATION: The Atlantic Offshore Lobstermen's Association submitted a complete application for an Exempted Fishing Permit (EFP) to conduct commercial fishing activities that the regulations would otherwise restrict to assess the distribution and abundance of lobster larvae and their potential food sources. This EFP would exempt the participating vessels from the Federal regulations described in Table 1.

TABLE 1—REQUESTED EXEMPTIONS

Citation	Regulation	Need for exemption
50 CFR 697.7(c)(1)(xxii)	Lobster gear prohibitions	To allow for the use of multiple gear types capable of catching lobsters.
§ 697.17(a)	Lobster possession restrictions	To allow the harvest of lobster above the non-trap limit.
§ 697.20(a)	Lobster possession restrictions	To allow for the collection of larval lobsters below the minimum size.

This project would provide information on the spatial and temporal distribution and abundance of early and late stage American lobster larvae and their likely zooplankton prey in the Gulf of Maine and Georges Bank. This study would use one federally permitted lobster vessel to conduct sampling with a neuston net at a single offshore site (Lobster Management Area 3) during 10 5–10 day fishing trips between May 15, 2022, and October 15, 2022. The participants would record physical parameters and conduct three 15-minute tows on a single day during each trip. After each tow, participants would preserve zooplankton in 500 mL sample bottles, a total of up to 30 bottles of preserved plankton, and transfer the samples to the project researchers. The crew has been trained to operate the scientific gear and obtain the samples without a technician on board.

The Atlantic Offshore Lobstermen's Association received an EFP for this project in 2021, but the crew was only able to sample on 4 of the 14 proposed dates in 2021. This EFP would allow the project team to complete the work and meet the project objectives.

Participants would land and sell legal catch caught in standard gear during the trips.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

(Authority: 16 U.S.C. 1801 *et seq.*)

Dated: February 18, 2022.

Ngagne Jafnar Gueye,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2022–03905 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB804]

Notice of Availability of the Deepwater Horizon Oil Spill Alabama Trustee Implementation Group Draft Swift Tract Living Shoreline Supplemental Environmental Assessment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability; request for comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act (NEPA), and a Consent Decree with BP Exploration & Production Inc. (BP), the *Deepwater Horizon* (DWH) Federal natural resource trustee agencies for the Alabama Trustee Implementation Group (Alabama TIG) have prepared a Draft Swift Tract Living Shoreline Supplemental Environmental Assessment (Draft Supplemental EA). This Draft Supplemental EA evaluates the proposed removal of rocks from the bay bottom near the Swift Tract project action area and the placement of the removed rocks on a nearby breakwater. The proposed action falls within the general scope of the purpose and need for the original project, Swift Tract Living Shoreline, identified in the Deepwater Horizon Oil Spill Programmatic and Phase III Early Restoration Plan and Early Restoration Programmatic Environmental Impact Statement (Phase III ERP/PEIS) and is consistent with the Deepwater Horizon Oil Spill Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement (PDARP/PEIS), as it focuses on the restoration of injuries to Alabama's natural resources and services—in particular to Restoration Type: ''Wetlands, Coastal, and Nearshore Habitats,'' using funds made available in early restoration and through the DWH Consent Decree (see Final PDARP/PEIS [DWH Trustees 2016: Chapter 10]). The Alabama TIG evaluated the environmental consequences of the alternatives in accordance with NEPA. The purpose of this notice is to inform the public of the availability of the Draft Supplemental EA and to seek public comments on the document.

DATES: The Alabama TIG will consider public comments received on or before March 28, 2022.

ADDRESSES: *Obtaining Documents:* You may access the Draft Supplemental EA from the ''News'' section of the Alabama TIG website at: *http://www.gulfspillrestoration.noaa.gov/restoration-areas/alabama.* Alternatively, you may request a CD of the Draft Supplemental EA (see **FOR FURTHER INFORMATION CONTACT** below).

Submitting Comments: You may submit comments on the Draft Supplemental EA by one of the following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/alabama;*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 29649, Atlanta, GA 30345. Please note that mailed comments must be postmarked on or before the comment deadline given in **DATES**.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Stella Wilson, NOAA Restoration Center, 850–332–4169, *estelle.wilson@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The DWH oil spill is the largest off shore oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over one million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The DWH Federal and State natural resource trustees (DWH Trustees) conducted the natural resource damage assessment for the DWH oil spill under OPA (OPA; 33 U.S.C. 2701 *et seq.*).

Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete.

The DWH Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

The Trustees reached and finalized a settlement of their natural resource damage claims with BP in an April 4, 2016, Consent Decree approved by the United States District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in the Alabama Restoration Area are now selected and implemented by the Alabama TIG.

Background

The Alabama Swift Tract Living Shoreline project (hereafter ''the project'') was selected in the Final Programmatic and Phase III Early Restoration Plan and Early Restoration Programmatic Environmental Impact Statement (Phase III ERP/PEIS). NOAA is the lead implementing Trustee for the project. The original Swift Tract project is located in the eastern portion of Bon Secour Bay (part of Mobile Bay) approximately 6 miles northwest of Gulf Shores in Baldwin County, Alabama. Construction was completed in February 2017 and 7 years of post-construction performance monitoring is ongoing. The project created approximately 1.75 miles (2.8 kilometers) of breakwaters in Bon Secour Bay to dampen wave energy and reduce shoreline erosion, while also providing habitat and increasing benthic secondary productivity. The project is adjacent to the Weeks Bay National Estuarine Research Reserve (NERR) and within the NERR buffer area.

Following construction completion, NOAA project team members were notified that there may be rocks located in Bon Secour Bay the project site, but outside the footprint of the breakwater. Thus, in March 2018, NOAA, through its contractor, collected sidescan sonar acoustic imaging, magnetometer, and single beam bathymetry surveys of the water bottom adjacent to the breakwaters to determine the location of any potential rock piles near the breakwater construction area. The results indicate that there are several hard surface contacts, likely rock piles, within the survey area. Recommendations from a corrective action report include either removing the material or leaving the material in-place as reef habitat. Both alternatives are evaluated in this Draft Supplemental EA.

Overview of the Alabama TIG Draft Supplemental EA

As described in Section III of this Draft Supplemental EA (the ''OPA Summary''), the Alabama TIG has determined that the proposed corrective action does not alter its original conclusions for the Swift Tract project under OPA and its implementing regulations. Thus, the Alabama TIG concludes that implementation of the corrective action proposed in this Supplemental EA does not require further OPA evaluation, and this Supplemental EA focuses its analysis on the potential environmental impacts of the proposed corrective action under NEPA.

This Supplemental EA provides NEPA analysis for the Swift Tract proposed corrective action by supplementing the NEPA analysis for the Phase III ERP/PEIS. The supplemental NEPA analysis provided in this Swift Tract Supplemental EA augments and incorporates by reference the applicable sections (Chapter 11, Affected Environment, Environmental Consequences for the Swift Tract Restoration Project) of the Phase III ERP/PEIS. This supplemental analysis considers any additional environmental impacts that would result from implementation of the corrective action that are not described and analyzed in the Phase III ERP/PEIS.

The Draft Supplemental EA evaluates the proposed removal of rocks from the bay bottom near the Swift Tract project action area and the placement of the removed rocks on a nearby breakwater.

The proposed rock removal and breakwater placement locations are adjacent to, but outside of, the project action area identified in the Final Phase III ERP/PEIS. Due to the close proximity of the new removal and placement areas to the existing Swift Tract breakwater, the Affected Environment for the proposed removal and placement areas would be the same as that evaluated for the Swift Tract breakwater in the Phase III ERP/PEIS. The environmental consequences of the proposed corrective action are also anticipated to fall generally within the scope of the environmental consequences evaluated for the original project. Therefore, the Environmental Consequences reviewed in the Swift Tract project evaluation, in Chapter 11, Section 11.4 of the Final Phase III ERP/PEIS, are reviewed in the Supplemental EA to evaluate the likely environmental consequences of the proposed corrective action and the ''No Action'' alternatives to determine whether implementation of the proposed corrective action may alter the conclusions made in the Final Phase III ERP/PEIS. Under the ''No Action'' alternative, the rocks currently located on the water bottom would not be removed from the water bottom and would instead be left in place.

Next Steps

The public is encouraged to review and comment on the Draft Supplemental EA. After the public comment period ends, the Alabama TIG will consider and address comments received before issuing a Final Supplemental EA. A summary of comments received and the Alabama TIG's responses and any revisions to the document, as appropriate, will be included in the final document.

Administrative Record

The documents comprising the Administrative Record for the Draft Supplemental EA can be viewed electronically at *http://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority of this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*) and its implementing Oil Pollution Act Natural Resource Damage Assessment regulations found at 15 CFR part 990 and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Dated: February 17, 2022.

Carrie Diane Robinson,

Director, Office of Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 2022–03887 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB814]

Marine Mammals; File No. 26375

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Jay Rotella Ph.D., Montana State University, 310 Lewis Hall, Bozeman, MT 59717, has applied in due form for a permit to conduct research on Weddell seals (*Leptonychotes weddellii*).

DATES: Written, telefaxed, or email comments must be received on or before March 28, 2022.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 26375 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 26375 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Sara Young or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant proposes to evaluate how temporal variation in the marine environment affects individual life-histories, immigration, and the dynamics of a population of long-lived mammal in Antarctica, primarily in Erebus Bay. This application requests permission to annually capture, tag and release up to 1,205 Weddell Seals (820 pups; 385 adults), to weigh up to 150 Weddell seal pups 35 days after birth, to collect tissue samples from 300 Weddell seals (150 pups; 150 adults), and to approach up to 2,770 Weddell seals a maximum of eight times to read tags. All samples will be transported via the U.S. Antarctic Program through Christchurch, New Zealand to institutions in the United States where they will be archived for various assays and studies. A maximum of eight crabeater seals (*Lobodon carcinophagus*), and two leopard seals (*Hydrurga leptonyx*) may be unintentionally harassed annually. The permit would be valid for 5 years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: February 17, 2022.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–03892 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB811]

Notice of Availability of the Deepwater Horizon Oil Spill Alabama Trustee Implementation Group Weeks Bay Land Acquisition (Lloyd Tract) Project: Supplemental Restoration Plan and Environmental Assessment and Finding of No Significant Impact

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability and Finding of No Significant Impact.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act (NEPA), and a Consent Decree with BP Exploration & Production Inc. (BP), the *Deepwater Horizon* (DWH) Federal and State natural resource trustee agencies for the Alabama Trustee Implementation Group (Alabama TIG) have prepared a ''Final Weeks Bay Land Acquisition (Lloyd Tract) Project: Supplemental Restoration Plan and Environmental Assessment (Supplemental RP/EA) and Finding of No Significant Impact (FONSI)''. The Supplemental RP/EA describes the restoration project alternatives considered by the Alabama TIG to provide for additional restoration benefits for Wetlands, Coastal, and Nearshore Habitats (WCNH) in the Alabama Restoration Area by replacing the Harrod Tract acquisition and management project approved in the ''Deepwater Horizon Oil Spill Alabama Trustee Implementation Group Final Restoration Plan II and Environmental Assessment: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; Nutrient Reduction (Nonpoint Source); Sea Turtles; Marine Mammals; Birds; and Oysters (Alabama TIG RP II/EA)'' with the acquisition and management of another property (Lloyd Tract) in the Weeks Bay watershed. The Alabama TIG evaluated its alternatives under criteria set forth in the OPA natural resource damage assessment (NRDA) regulations, and evaluated the environmental consequences of the restoration alternatives in accordance with NEPA. The purpose of this notice is to inform the public of the availability of the Final Supplemental RP/EA and FONSI.

ADDRESSES: *Obtaining Documents:* You may access the Supplemental RP/EA from the ''News'' section of the Alabama TIG website at: *http://www.gulfspillrestoration.noaa.gov/restoration-areas/alabama.* Alternatively, you may request a CD of the Final Supplemental RP/EA (see **FOR FURTHER INFORMATION CONTACT** below).

FOR FURTHER INFORMATION CONTACT:

NOAA—Stella Wilson, (850) 332–4169, *estelle.wilson@noaa.gov.*

State of Alabama—Amy Hunter, (251) 621–1216, *Amy.Hunter@dcnr.alabama.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The DWH oil spill is the largest off shore oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over one million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The DWH Federal and State natural resource trustees (DWH Trustees) conducted the NRDA for the DWH oil spill under OPA (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete.

The DWH Trustees are:

- U.S. Department of the Interior, as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration, on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture;
- U.S. Environmental Protection Agency;
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

The DWH Trustees reached and finalized a settlement of their natural resource damage claims with BP in an April 4, 2016, Consent Decree approved by the United States District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in the Alabama Restoration Area are now selected and implemented by the Alabama TIG. The Alabama TIG is composed of the following Trustees:

- National Oceanic and Atmospheric Administration;
- U.S. Department of the Interior;
- U.S. Environmental Protection Agency;
- U.S. Department of Agriculture;
- State of Alabama Department of Conservation and Natural Resources; and
- Geological Survey of Alabama.

Background

In the Alabama TIG RP II/EA, the Alabama TIG selected 20 projects for implementation, allocating funds from several restoration types including the WCNH restoration type. One of the projects selected for implementation in the funds, was the Weeks Bay Land Acquisition (Harrod Tract) project. For the reasons identified in the Supplemental RP/EA the Alabama TIG has terminated the Harrod Tract project via TIG Resolution. This Supplemental RP/EA supplements the Alabama TIG RP II/EA, evaluating the Alabama TIG's proposal to use those funds previously allocated to the Harrod Tract project to support a new acquisition project in the same watershed.

Notice of availability of the Draft Supplemental RP/EA was posted to the Alabama TIG website, *http://www.gulfspillrestoration.noaa.gov/restoration-areas/alabama* on December 6, 2021. The TIG provided the public with 30 days to review and comment on the Draft Supplemental RP/EA. During the public comment period, one comment was received voicing general support of the project and noting the importance of protecting this parcel from future development. This correspondence is included as Appendix A.

Overview of the Alabama TIG Final Supplemental RP/EA

The termination of the Harrod Tract project has resulted in $3,606,900 of previously allocated WCNH restoration funds to become available to the Alabama TIG. Accordingly, the Alabama TIG is proposing to use those funds to support a new acquisition project in the Weeks Bay watershed, where the Harrod Tract acquisition would have occurred. Specifically, in this Supplemental RP/EA, the Alabama TIG evaluates the use of WCNH funds to acquire a tract known as the Lloyd Tract, which is located along two tributaries of the Fish River, slightly upstream from the Harrod Tract. The property is bordered by two tidal creeks, Waterhole Branch and Green Branch, and their confluence occurs at the southeastern boundary of the property. The Lloyd Tract has a willing seller, is at risk of development, contains farmland that can be restored to longleaf pine habitat, would become part of the Weeks Bay National Estuarine Research Reserve, and would provide restoration benefits to wetlands, coastal, and nearshore habitats. A no action alternative is also evaluated in the Supplemental RP/EA.

Administrative Record

The documents comprising the Administrative Record for the Final Supplemental RP/EA can be viewed electronically at *http://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority of this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*) and its implementing OPA NRDA regulations found at 15 CFR part 990 and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Dated: February 17, 2022.

Carrie Diane Robinson,

Director, Office of Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 2022–03890 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent Review and Derivation Proceedings

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on December 7, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Patent Review and Derivation Proceedings.

OMB Control Number: 0651–0069.

Needs and Uses: The Leahy-Smith America Invents Act, which was enacted into law on September 16, 2011, provided for many changes to the procedures of the Patent Trial and Appeal Board (''PTAB'' or ''Board,'' formerly the Board of Patent Appeals and Interferences) procedures. These changes included the introduction of *inter partes* review, post-grant review, derivation proceedings, and the transitional program for covered business method patents. Under these administrative trial proceedings, third parties may file a petition with the PTAB challenging the validity of issued patents, with each proceeding having different requirements regarding timing restrictions, grounds for challenging validity, and who may request review.

Inter partes review is a trial proceeding conducted at the Board to review the patentability of one or more claims in a patent only on a ground that could be raised under §§ 102 or 103, and only on the basis of prior art consisting of patents or printed publications. Post grant review is a trial proceeding conducted at the Board to review the patentability of one or more claims in a patent on any ground that could be raised under § 282(b)(2) or (3). A derivation proceeding is a trial proceeding conducted at the Board to determine whether (1) an inventor named in an earlier application derived the claimed invention from an inventor named in the petitioner's application, and (2) the earlier application claiming such invention was filed without authorization. The transitional program for covered business method patents is a trial proceeding conducted at the Board to review the patentability of one or more claims in a covered business method patent. The covered business method program expired on September 16, 2020 and the Board no longer accepts new petitions related to this program, but continues to accept papers in previously-instituted proceedings.

This information collection covers information submitted by the public to petition the Board to initiate an *inter partes* review, post-grant review, derivation proceeding, and the transitional program for covered business method patents, as well as any responses to such petitions, and the filing of any motions, replies, oppositions, and other actions, after a review/proceeding has been instituted.

Form Numbers: None.

Type of Review: Extension and revision of a currently approved information collection.

Affected Public: Private sector; individuals or households.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Estimated Number of Annual Respondents: 9,238 respondents.

Estimated Number of Annual Responses: 12,338 responses.

Estimated Time per Response: The USPTO estimates that the responses in this information collection will take the public between 30 minutes (0.5 hours) and 165 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 1,368,058 hours.

Estimated Total Annual Respondent Non-Hourly Cost Burden: $69,638,370.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0069.

Further information can be obtained by:

• *Email: InformationCollection@uspto.gov.* Include ''0651–0069 information request'' in the subject line of the message.

• *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2022–03943 Filed 2–23–22; 8:45 am]

BILLING CODE 3510–16–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2022–0011]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau or CFPB) is requesting to extend the Office of Management and Budget's (OMB's) approval for an existing information collection, titled ''Mortgage Assistance Relief Services (Regulation O).''

DATES: Written comments are encouraged and must be received on or before April 25, 2022 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2022–0011 in the subject line of the email.

• *Mail/Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID–19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier. Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.regulations.gov.* Requests for additional information should be directed to Anthony May, PRA Officer, at (202) 435–7278, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Mortgage Assistance Relief Services (Regulation O).

OMB Control Number: 3170–0007.

Type of Review: Extension of a currently approved information collection.

Affected Public: Businesses and other for-profit entities.

Estimated Number of Respondents: 120.

Estimated Total Annual Burden Hours: 360.

Abstract: The required disclosures under Regulation O (12 CFR part 1015) assist prospective purchasers of mortgage assistance relief services (MARS) in making well-informed decisions and avoiding deceptive unfair acts and practices. The Bureau and the Federal Trade Commission use the information provided under Regulation O's recordkeeping requirements for enforcement purposes and to ensure compliance with Regulation O by MARS providers. The information is requested only on a case-by-case basis.

Request for Comments: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Anthony May,

Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.

[FR Doc. 2022–03874 Filed 2–23–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0123]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Policy, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: The Defense Institute of Security Assistance Management Information Technology Mission System; Defense Institute of Security Assistance Management Form GSI–001; OMB Control Number 0704–0548.

Type of Request: Extension.

Number of Respondents: 5,024.

Responses per Respondent: 2.

Annual Responses: 10,048.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 2,512.

Needs and Uses: The Defense Institute of Security Assistance Management (DISAM) Information Technology Mission System is a web based portal designed to hold several web applications for the purposes of efficient administration of U.S. and international students, and the effective management of DISAM personnel and guest lecturers. The portal provides DISAM personnel the ability to submit travel requests and travel arrangements. Finally, the web based portal uses a relational database to record, manage and report information about students, personnel, and travel. Reports of annual training of foreign nationals are submitted to Congress as required by 22 U.S. Code 2394 (Foreign Assistance Act) and 22 U.S. Code 2770A (Arms Export Control Act).

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 18, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–03944 Filed 2–23–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–OS–0025]

Proposed Collection; Comment Request

AGENCY: The Office of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 25, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Human Resources Activity, 4800 Mark Center Drive, Suite 08F05, Alexandria, VA 22350, LaTarsha Yeargins, 571–372–2089.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Disposition of Remains-Reimbursable Basis Request for Payment of Funeral and/or Interment Expenses; DD Form 2065, DD Form 1375; OMB Control Number 0704—0030.

Needs and Uses: This collection is needed to support service members and other federal agencies by providing mortuary services, transportation, funeral and interment, support for deceased dependents of service members; and transportation and mortuary service support requested by other federal agencies. This allows the person authorized to direct disposition of our service members remains to be reimbursed for authorized expenses incident to death.

DD Forms 2065 and 1375 are initially prepared by military authorities and presented to the next-of-kin or sponsor to fill-in the reimbursable costs or desired disposition of remains. Without the information on these forms, the U.S. government would not be able to respond to the survivor's wishes or justify its expenses in handling the deceased.

Affected Public: Individuals or households.

Annual Burden Hours: 1,225 hours.

Number of Respondents: 2,450.

Responses per Respondent: 1.

Annual Responses: 2,450.

Average Burden per Response: 30 minutes.

Frequency: On occasion.

Dated: February 18, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–03934 Filed 2–23–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–HA–0127]

Submission for OMB Review; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: TRICARE Select Survey of Civilian Providers; OMB Control Number 0720–0031.

Type of Request: Extension.

Number of Respondents: 20,000.

Responses per Respondent: 1.

Annual Responses: 20,000.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 1,666.67.

Needs and Uses: As mandated by Congress, the information collection requirement is necessary to determine how many providers are aware of the TRICARE health benefits program, and specifically accept new TRICARE Select patients in each market area. Surveys of civilian physician and non-physician behavioral health care providers will be conducted in a number of locations in the U.S. each year. Respondents include civilian physicians (M.D.s & D.O.s) and non-physician behavioral health providers (clinical psychologists, clinical social workers and other TRICARE authorized behavioral health providers). The locations surveyed will include areas where the TRICARE Prime benefit is offered (known as TRICARE PRIME Service Areas) and geographic areas where TRICARE Prime is not offered. Respondents will be contacted by mail with a telephone follow-up to complete the survey.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Julie Wise.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 18, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–03945 Filed 2–23–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0124]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Defense Logistics Agency Child and Youth Program Forms; DLA Forms 1849, 1849–1, 1849–2, 1849–3, 1849–4, 1855, 1855–1, 1855–1A, 1855–1B, 1855–1C, 1855–1D (Parts I and II), 1855–1E, 1855–1F; OMB Control Number 0704–0582.

Type of Request: Revision.

Number of Respondents: 828.

Responses per Respondent: 14.56.

Annual Responses: 12,055.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 1,004.58.

Needs and Uses: The DoD requires the information in the proposed collection in support of the Defense Logistics Agency (DLA) Child and Youth Programs (CYPs). This collection includes fourteen DLA forms, some of which are used by all of the collection respondents and some of which are used under specific circumstances. The information collected is used for program planning, management, and health and safety purposes. More specifically, the information in the proposed collection allows CYP staff to provide safe, developmentally appropriate day care services and to ensure proper, effective response in the event of an emergency. Respondents include patrons enrolling their children in a CYP; these patrons may include active duty military, DoD civilian employees, and DoD contractors.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 18, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–03947 Filed 2–23–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–OS–0026]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 25, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Human

Resources Activity, 4800 Mark Center Drive, Suite 08F05, Alexandria, VA 22350, LaTarsha Yeargins, 571–372–2089.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Job ChalleNGe Participant Focus Groups; OMB Control Number 0704–JCFG.

Needs and Uses: 32 U.S. Code 509, ''National Guard Youth Challenge Program of Opportunities for Civilian Youth'' seeks to ''improve life skills and employment potential of participants by providing military-based training and supervised work experience, together with the core program components of assisting participants, to receive a high school diploma or its equivalent, leadership development, etc.'' Job ChalleNGe is an extension of Youth ChalleNGe and provides technical and career training to graduates of Youth ChalleNGe.

This collection is part of a study examining the implementation of the Job ChalleNGe program across its six operating sites. This program focuses on underserved populations and communities and brings them into alignment with Executive Order (E.O.) 13985, which directs the Federal Government to work to advance equity, with a focus on historically underserved communities. The E.O. also directs resources to be allocated to advance fairness and opportunity. The results of this collection will help inform site operations and continuous program improvement. This information is being collected to better understand program participants' experiences and perceptions. This information will be used to help inform site operations, program policy decisions, and drive continuous program improvement.

Affected Public: Individuals or households.

Annual Burden Hours: 75 hours.

Number of Respondents: 60.

Responses per Respondent: 1.

Annual Responses: 60.

Average Burden per Response: 75 minutes.

Frequency: On occasion.

Dated: February 18, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–03935 Filed 2–23–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–HA–0027]

Proposed Collection; Comment Request

AGENCY: The Office of the Assistant Secretary of Defense for Health Affairs (OUSD(HA)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Uniformed Services University of the Health Sciences announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 25, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Health Agency, 7700 Arlington Blvd., Falls Church, VA 22042, Terry McDavid, 703–681–3645.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Comparing Hospital Hand Hygiene in Liberia: Soap, Alcohol, and Hypochlorite; OMB Control Number 0720–0062.

Needs and Uses: This information collection is necessary to conduct research as part of a U.S.-Liberia collaboration funded by the U.S. Department of Defense Center for Global Health Engagement. The study objectives are to determine the most appropriate cleansing material (soap, alcohol, or hypochlorite/chlorine solution) for routine hand hygiene in Liberian healthcare facilities and to determine how best to implement hand hygiene programs in these facilities. Results of this study may inform Liberian Government strategies to expand and implement best hospital hand hygiene intervention(s) across the nation, and also help shape hand hygiene program implementation in U.S. DoD global humanitarian and disaster response assistance.

Affected Public: Individuals or households.

Annual Burden Hours: 257.88.

Number of Respondents: 84.

Responses per Respondent: 3.07.

Annual Responses: 257.88.

Average Burden per Response: 1 hour.

Frequency: As requested.

Dated: February 18, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–03932 Filed 2–23–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0024]

Agency Information Collection Activities; Comment Request; 2023–2024 Free Application for Federal Student Aid (FAFSA)

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before April 25, 2022.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2022–SCC–0024. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–570–8414.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: 2023–2024 Free Application for Federal Student Aid.

OMB Control Number: 1845–0001.

Type of Review: A revision of a currently approved collection.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 33,962,310.

Total Estimated Number of Annual Burden Hours: 22,844,712.

Abstract: Section 483, of the Higher Education Act of 1965, as amended (HEA), mandates that the Secretary of Education ''. . . shall produce, distribute, and process free of charge common financial reporting forms as described in this subsection to be used for application and reapplication to determine the need and eligibility of a student for financial assistance. . .''.

The determination of need and eligibility are for the following Title IV, HEA, federal student financial assistance programs: The Federal Pell Grant Program; the Campus-Based programs (Federal Supplemental Educational Opportunity Grant (FSEOG) and Federal Work-Study (FWS)),; the William D. Ford Federal Direct Loan (Direct Loan) Program; the Teacher Education Assistance for College and Higher Education (TEACH) Grant; the Children of Fallen Heroes Scholarship; and the Iraq and Afghanistan Service Grant.

Federal Student Aid (FSA), an office of the U.S. Department of Education, subsequently developed an application process to collect and process the data necessary to determine a student's eligibility to receive Title IV, HEA program assistance. The application process involves an applicant's submission of the Free Application for Federal Student Aid (FAFSA®). After submission and processing of the FAFSA form, an applicant receives a Student Aid Report (SAR), which is a summary of the processed data they submitted on the FAFSA form. The applicant reviews the SAR, and, if necessary, will make corrections or updates to their submitted FAFSA data. Institutions of higher education listed by the applicant on the FAFSA form also receive a summary of processed data submitted on the FAFSA form which is called the Institutional Student Information Record (ISIR).

ED and FSA seek OMB approval of all application components as a single ''collection of information.'' The aggregate burden will be accounted for under OMB Control Number 1845–0001. The specific application components, descriptions, and submission methods for each are listed in Table 1.

TABLE 1—FEDERAL STUDENT AID APPLICATION COMPONENTS

Component	Description	Submission method
Initial Submission of FAFSA		
FAFSA	The electronic version of the FAFSA form completed by applicants	Submitted by the applicant.
FAFSA—Renewal	The electronic version of the FAFSA form completed by applicants who have previously completed the FAFSA form.	
FAFSA—EZ	The electronic version of the FAFSA form for applicants who qualify Automatic Zero (Auto Zero) needs analysis formula and the applicant's State of Legal Residence is one that allows for the skipping of questions not used in the EFC calculation.	
FAFSA—EZ Renewal	The electronic version of the FAFSA form for applicants who have previously completed the FAFSA form and who qualify Automatic Zero (Auto Zero) needs analysis formula and the applicant's State of Legal Residence is one that allows for the skipping of questions not used in the EFC calculation.	
FAA Access	Online tool that a financial aid administrator (FAA) utilizes to submit a FAFSA form	Submitted by an FAA on behalf of an applicant.
FAA Access—Renewal	Online tool that an FAA can utilize to submit a Renewal FAFSA form.	
FAA Access—EZ	Online tool that an FAA can utilize to submit a FAFSA form for applicants who qualify for Auto Zero needs analysis formula and the applicant's State of Legal Residence is one that allows for the skipping of questions not used in the EFC calculation.	
FAA Access—EZ Renewal	Online tool that an FAA can utilize to submit a FAFSA form for applicants who have previously completed the FAFSA form and who qualify Auto Zero needs analysis formula and the applicant's State of Legal Residence is one that allows for the skipping of questions not used in the EFC calculation.	

TABLE 1—FEDERAL STUDENT AID APPLICATION COMPONENTS—Continued

Component	Description	Submission method
Electronic Other	This is a submission done by an FAA, on behalf of the applicant, using the Electronic Data Exchange (EDE).	The FAA may be using their mainframe computer or software to facilitate the EDE process.
Printed FAFSA	The printed version of the PDF FAFSA for applicants who are unable to access the Internet or complete the form using *fafsa.gov* or the myStudentAid mobile app.	Mailed by the applicant.
Correcting Submitted FAFSA Information and Reviewing FAFSA Information		
fafsa.gov—Corrections	Any applicant who has a Federal Student Aid ID (FSA ID)—regardless of how they originally applied—may make corrections.	Submitted by the applicant.
Electronic Other—Corrections	With the applicant's permission, corrections can be made by an FAA using the EDE	The FAA may be using their mainframe computer or software to facilitate the EDE process.
Paper SAR—This is a SAR and an option for corrections.	The full paper summary that is mailed to paper applicants who did not provide an e-mail address and to applicants whose records were rejected due to critical errors during processing. Applicants can write corrections directly on the paper SAR and mail for processing.	Mailed by the applicant.
FAA Access—Corrections	An institution can use FAA Access to correct the FAFSA form	Submitted by an FAA on behalf of an applicant.
Internal Department Corrections	The Department will submit an applicant's record for system-generated corrections to the Central Processing System. There is no burden to the applicants under this correction type as these are system-based corrections.	These corrections are system-generated.
Federal Student Aid Information Center (FSAIC) Corrections.	Any applicant, with their Data Release Number (DRN), can change the postsecondary institutions listed on their FAFSA form or change their address by calling FSAIC.	These changes are made directly in the CPS by an FSAIC representative.
SAR Electronic (eSAR)	The eSAR is an online version of the SAR that is available on *fafsa.gov* to all applicants with an FSA ID. Notification for the eSAR is sent to students who applied electronically or by paper and provided a valid e-mail address. These notifications are sent by e-mail and include a secure hyperlink that takes the user to the *fafsa.gov* site.	Cannot be submitted for processing.
SAR Acknowledgement	The SAR Acknowledgement is a condensed paper SAR that is mailed to applicants who applied electronically but did not provide a valid e-mail address.	Cannot be submitted for processing.

This information collection also documents an estimate of the annual public burden as it relates to the application process for federal student aid. The Applicant Burden Model (ABM) measures applicant burden through an assessment of the activities each applicant conducts in conjunction with other applicant characteristics and, in terms of burden, the average applicant's experience. Key determinants of the ABM include:

- The total number of applicants that will potentially apply for federal student aid;
- How the applicant chooses to complete and submit the FAFSA form (*e.g.,* by paper or electronically);
- How the applicant chooses to submit any corrections and/or updates (*e.g.,* the paper SAR or electronically);
- The type of SAR document the applicant receives (eSAR, SAR acknowledgment, or paper SAR);
- The formula applied to determine the applicant's expected family contribution (EFC) (full need analysis formula, Simplified Needs Test or Automatic Zero); and
- The average amount of time involved in preparing to complete the application.

The ABM is largely driven by the number of potential applicants for the application cycle. The total application projection for 2023–2024 is based on the projected total enrollment into post-secondary education for Fall 2023. The ABM is also based on the application options available to students and parents. ED accounts for each application component based on analytical tools, survey information and other ED data sources.

For 2023–2024, ED is reporting a net burden decrease of 3,466,325 hours.

Dated: February 17, 2022.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–03868 Filed 2–23–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD22–5–000]

Implementation of Dynamic Line Ratings

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission (Commission) seeks comment on whether and how the required use of dynamic line ratings (DLR) is needed to ensure just and reasonable wholesale rates. The Commission further seeks comment on: Whether the lack of DLR requirements renders current wholesale rates unjust and unreasonable; potential criteria for DLR requirements; the benefits, costs, and challenges of implementing DLRs; the nature of potential DLR requirements; and potential timeframes for implementing DLR requirements.

DATES: Initial Comments are due April 25, 2022, and Reply Comments are due May 25, 2022.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through *http://www.ferc.gov* is preferred.

- *Electronic Filing through http://www.ferc.gov.* Documents created electronically using word processing software must be filed in acceptable native applications or print-to-PDF format, but not in scanned or picture format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail comments via the U.S. Postal Service to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. Hand-delivered comments or comments sent via any other carrier should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.
- *Instructions:* For detailed instructions on submitting comments,

see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Kheloussi (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6391, *Daniel.Kheloussi@ferc.gov*.

Ryan Stroschein (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8099, *Ryan.Stroschein@ferc.gov*.

SUPPLEMENTARY INFORMATION: In this Notice of Inquiry (NOI), the Federal Energy Regulatory Commission (Commission) seeks comment on whether and how the required use of dynamic line ratings (DLR) [1] is needed to ensure just and reasonable wholesale rates. The Commission further seeks comment on: Whether the lack of DLR requirements renders current wholesale rates [2] unjust and unreasonable; potential criteria for DLR requirements; the benefits, costs, and challenges of implementing DLRs; the nature of potential DLR requirements; and potential timeframes for implementing DLR requirements.

I. Background

1. On December 16, 2021, the Commission issued Order No. 881 in Docket No. RM20–16–000. In that order, pursuant to section 206 of the Federal Power Act (FPA), the Commission revised the Commission's *pro forma* open access transmission tariff (OATT) and the Commission's regulations to improve the accuracy and transparency of electric transmission line ratings.[3] Specifically, the Commission found that the use of only seasonal and static temperature assumptions in developing transmission line ratings would result in transmission line ratings that do not accurately represent the transfer capability of the transmission system.[4] The Commission found that inaccurate transmission line ratings result in unjust and unreasonable Commission-jurisdictional rates.[5]

2. Accordingly, the Commission required, among other things and with limited exceptions: (1) Transmission providers [6] to use ambient-adjusted ratings (AARs) [7] as the basis for evaluation of transmission service requests that will end within 10 days of the request and as the basis for their determination of the necessity of certain curtailment, interruption, or redispatch of transmission service anticipated to occur within those 10 days; (2) transmission providers to use seasonal line ratings as the basis for evaluation of transmission service requests ending more than 10 days from the date of the request and as the basis for the determination of the necessity of curtailment, interruption, or redispatch of transmission service that is anticipated to occur more than 10 days in the future; and (3) regional transmission organizations and independent system operators (RTOs/ISOs) to establish and maintain the systems and procedures necessary to allow transmission owners in their regions to electronically update transmission line ratings on at least an hourly basis (thereby enabling the RTO/ISO to use DLRs from transmission owners that voluntarily adopt them).[8]

3. While acknowledging in Order No. 881 that, in certain situations, using transmission line ratings that are based on factors beyond forecasted ambient air temperatures and the presence or absence of solar heating—such as DLRs—may lead to greater accuracy of transmission line ratings, the Commission declined to mandate DLR implementation based on the record in that proceeding.[9] Instead, the Commission incorporated that record on DLRs into the instant proceeding, Docket No. AD22–5–000, which the Commission opened to further explore DLR implementation.

4. The Commission explained that, unlike AARs, DLRs are based not only on forecasted ambient air temperatures and the presence or absence of solar heating, but also on other weather conditions, such as wind, cloud cover, solar heating intensity (instead of only daytime/nighttime distinctions used in AARs), and precipitation, and/or on transmission line conditions such as tension or sag.[10] The Commission agreed with commenters that highlighted the benefits to DLR implementation.[11] For example, the Commission agreed with the Exelon Corporation (Exelon) that there may be applications in which DLRs can provide net benefits to customers, such as when the limiting element for a transmission facility experiencing significant congestion is the conductor and conditions besides ambient air temperature have a consistent and significant impact on the power carrying capabilities of the line. The Commission also acknowledged that the use of DLRs generally allows for greater power flows than would otherwise be allowed and that their use can also detect situations where power flows should be reduced to maintain safe and reliable operation and avoid unnecessary wear on transmission equipment.[12]

5. Despite the benefits of DLR implementation, the Commission recognized that DLR implementation also presents additional costs and challenges not found in AAR implementation, such as costs associated with placement of sensors, cybersecurity, and other costs.[13] The Commission found that the record in the Order No. 881 proceeding, Docket No. RM20–16–000, was not sufficient for it to evaluate the relative benefits and costs and challenges of DLR implementation.[14]

II. Discussion

6. We are issuing this NOI to further explore whether DLR implementation is required to ensure just and reasonable wholesale rates. We invite all interested persons to submit comments and reply comments on any or all of the questions listed. Commenters need not answer all the questions. Commenters should organize responses consistent with the structure of the attached questions.

[1] A DLR is a transmission line rating that: ''(1) applies to a time period of not greater than one hour; and (2) reflects up-to-date forecasts of inputs such as (but not limited to) ambient air temperature, wind, solar heating intensity, transmission line tension, or transmission line sag.'' *Managing Transmission Line Ratings,* Order No. 881, **Federal Register**, 87 FR 2244 (Jan. 13, 2022), 177 FERC ¶ 61,179, at P 7 (2021).

[2] Consistent with Order No. 881, by ''wholesale rates,'' we refer to both rates for the transmission of electric energy in interstate commerce and rates for the sale of electric energy at wholesale in interstate commerce. *Id.* P 29.

[3] *Id.* P 1.

[4] *Id.* P 3.

[5] *Id.*

[6] Consistent with Order No. 881, we use transmission provider to mean any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce. 18 CFR 37.3 (2021). Therefore, unless otherwise noted, ''transmission provider'' refers only to public utility transmission providers. Furthermore, the term ''public utility'' as found in section 201(e) of the FPA means ''any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter.'' 16 U.S.C. 824(e).

[7] An AAR is a transmission line rating that: ''(1) applies to a time period of not greater than one hour; (2) reflects an up-to-date forecast of ambient air temperature across the time period to which the rating applies; (3) reflects the absence of solar heating during nighttime periods where the local sunrise/sunset times used to determine daytime and nighttime periods are updated at least monthly, if not more frequently; and (4) is calculated at least each hour, if not more frequently.'' Order No. 881, 177 FERC ¶ 61,179 at P 4.

[8] *Id.* PP 4–9.

[9] *Id.* PP 7–8, 36, 252.

[10] *Id.* P 7.

[11] *Id.* P 253.

[12] *Id.*

[13] *Id.* P 254.

[14] *Id.*

Commenters are also invited to reference material previously filed, including in Docket Nos. RM20–16–000 and AD19–15–000, but are encouraged to avoid repetition or replication of previous material. Initial comments must be submitted on or before 60 days after the date of publication of this NOI in the **Federal Register**. Reply comments must be submitted on or before 90 days after the date of publication of this NOI in the **Federal Register**.

A. Questions on the Need for DLR Requirements

7. In Order No. 881, the Commission found that transmission line ratings directly affect wholesale rates because transmission line ratings and wholesale rates are inextricably linked.[15] It explained that transmission line ratings represent the maximum transfer capability on a transmission line, which, in turn, determines the quantity of energy that can be transmitted from suppliers to load. The Commission explained that, all else equal, as transfer capability declines, wholesale rates increase. The Commission also observed that inaccurate transmission line ratings can result in underutilization (or overutilization) of existing transmission facilities, thereby sending a signal that there is less (or more) transfer capability than is truly available.[16]

(Q1) As a threshold matter, even for transmission lines that incorporate AARs, is there a need to further increase the accuracy of transmission lines ratings through the implementation of DLRs to ensure just and reasonable wholesale rates? Why or why not? If yes, please explain whether a requirement by the Commission to adopt DLRs is needed.

(Q2) What, if any, barriers to DLR implementation exist today? Are potential requirements to implement DLRs necessary to address these existing barriers? Why or why not?

B. Questions on Potential Criteria for DLR Requirements

8. Commenters in the Order No. 881 proceeding expressed a range of opinions on whether and how the Commission should require the implementation of DLRs. On one end of the spectrum, Southwest Power Pool, Inc.'s Market Monitoring Unit (SPP MMU) stated that it supported a requirement for DLR implementation on all transmission lines.[17] Similarly, Industrial Customer Organizations and the R Street Institute contended that DLRs should be required by default, with exceptions given when justified by cost-benefit analyses.[18] On the other end, many commenters, including nearly all transmission owners that filed comments about DLRs, either opposed a requirement to implement DLRs on all transmission lines[19] or opposed a DLR requirement in any form.[20]

9. Other commenters supported targeted or limited DLR implementation. For example, the WATT Coalition (WATT) and Clean Energy Parties proposed criteria for requiring DLR implementation and contended that such criteria could help overcome concern about costs of DLRs exceeding benefits.[21] Specifically, WATT proposed that the Commission require ''sensor-based DLRs'' on all thermally limited transmission lines rated 69 kV or greater when: (1) Market congestion totaling over $1 million has occurred within the past year; (2) the transmission line is identified as being a constraint projected to have market congestion over $1 million over the coming three years as a part of the current RTO/ISO transmission planning cycle process, which can be economic or reliability based; (3) thermally limited transmission lines show up as limiting in generator interconnection system impact studies; or (4) generation curtailed by more than 10% on average for one year due to factors that include transmission line capacity.[22]

(Q3) If the Commission were to require DLR implementation, should it require the implementation only on certain transmission lines, and, if so, what set of criteria should be considered to identify transmission lines for DLR implementation? Examples of such criteria could include congestion, curtailment levels, voltage levels, infrastructure, and/or geography/terrain. Explain why such criteria would identify the set of transmission lines on which DLRs need to be implemented in order to produce just and reasonable wholesale rates.

(Q4) How should transmission lines be evaluated for whether they satisfy such criteria, both initially and going forward? Please estimate the number and proportion of transmission lines that would likely be implicated by any criteria you recommend.

(Q5) If the Commission were to require DLR implementation based on certain criteria, should the criteria be regularly reevaluated to ensure such criteria continue to ensure accurate transmission line ratings, and, if so, at what interval(s)? How should such regular reevaluations work practically?

(Q6) If such criteria included the magnitude of congestion on a transmission line, what metrics exist that assess the magnitude of congestion in both or either RTO/ISO and/or non-RTO/ISO regions? For any congestion metrics suggested, what data sources are available?

(Q7) Implementation of the requirements adopted in Order No. 881 are expected to change congestion patterns. How should these congestion pattern changes be accounted for when considering whether a transmission line satisfies the criteria established as part of any potential DLR requirements?

(Q8) What are the differences, if any, between RTOs/ISOs and non-RTO/ISO transmission providers that the Commission should account for when considering any DLR requirements?

(Q9) If the Commission were to require DLR implementation based on certain criteria, should it require that new transmission lines be evaluated to determine whether they must implement DLRs? Are there any characteristics of new transmission lines that warrant different criteria?

(Q10) If the Commission were to require DLR implementation, how should that requirement be considered in regional transmission planning and interconnection processes?

(Q11) If the Commission were to require DLR implementation based on certain criteria, what transparency measures should the Commission require? For example, should the Commission consider requiring transmission providers to submit informational reports that show which transmission lines meet any determined criteria for DLR implementation? And/or should the Commission require transmission providers to post the same on their Open Access Same-Time Information System websites?

C. Questions on the Benefits, Costs, and Challenges of Implementing DLRs

10. While the Commission in Order No. 881 highlighted the potential

[15] *Id.* P 30.

[16] *Id.* PP 30, 34.

[17] SPP MMU, Comments, Docket No. RM20–16–000, at 4 (filed Mar. 22, 2021).

[18] R Street Institute, Comments, Docket No. RM20–16–000, at 3 (filed Mar. 22, 2021); Industrial Customer Organizations, Comments, Docket No. RM20–16–000, at 5 (filed Mar. 22, 2021).

[19] Arizona Public Service Company, Comments, Docket No. RM20–16–000, at 8 (filed Mar. 22, 2021); New York Transmission Owners, Comments, Docket No. RM20–16–000, at 2 (filed Mar. 22, 2021); Indicated PJM Transmission Owners, Comments, Docket No. RM20–16–000, at 13 (filed Mar. 22, 2021); Pacific Gas and Electric Company, Comments, Docket No. RM20–16–000, at 11–12 (filed Mar. 22, 2021).

[20] American Electric Power Service Corporation, Comments, Docket No. RM20–16–000, at 6 (filed Mar. 22, 2021); Dominion Energy Services Inc., Comments, Docket No. RM20–16–000, at 9 (filed Mar. 22, 2021); Entergy Services LLC, Comments, Docket No. RM20–16–000, at 14 (filed Mar. 22, 2021); Bonneville Power Administration (BPA), Comments, Docket No. RM20–16–000, at 6 (filed Mar. 22, 2021); Exelon, Comments, Docket No. RM20–16–000, at 3 (filed Mar. 22, 2021); PacifiCorp, Comments, Docket No. RM20–16–000, at 5–6 (filed Mar. 22, 2021); National Rural Electric Cooperative Association and the Large Public Power Council, Comments, Docket No. RM20–16–000, at 3 (filed Mar. 22, 2021); MISO Transmission Owners, Comments, Docket No. RM20–16–000, at 45–46 (filed Mar. 22, 2021); ITC Holdings Corp., Comments, Docket No. RM20–16–000, at 14–15 (filed Mar. 22, 2021).

[21] WATT, Comments, Docket No. RM20–16–000, at 10–11 (filed Mar. 22, 2021); Clean Energy Parties, Comments, Docket No. RM20–16–000, at 7–10 (filed Mar. 22, 2021); American Clean Power Association and the Solar Energy Industries Association (ACPA/SEIA), Comments, Docket No. RM20–16–000, at 9–10 (filed Mar. 22, 2021).

[22] WATT, Comments, Docket No. RM20–16–000, at 10–11 (filed Mar. 22, 2021).

benefits of DLR implementation, including potential increases in the accuracy of transmission line ratings and potentially greater power flows, it recognized that there are costs and challenges associated with DLR implementation. Some commenters in the Order No. 881 proceeding provided DLR cost estimates, but there was limited detail around those estimates and those estimates varied. For example, BPA asserted that DLR implementation would require investment of potentially over $1 million per transmission line in monitoring equipment, software, and hardware to submit and host the data.[23] MISO Transmission Owners contended that DLR implementation could cost between $100,000 and $200,000 per transmission line, and thus the overall cost to implement DLRs for all transmission lines in MISO would be approximately $1.5 billion.[24] SPP estimated that DLR implementation that requires an energy management system (EMS) upgrade would cost transmission owners up to $1 million and, without upgrading the EMS, DLR implementation would cost an additional $100,000 to $500,000 annually in additional supervisory control and data acquisition (SCADA) communications with the reliability coordinator's EMS.[25]

(Q12) For any DLR requirement criteria you identified in response to question Q3 above, please explain and, if possible, quantify the potential annual gross market benefits that would be expected to result from such a requirement.

(a) If possible, please also provide estimated upper and lower bounds on such gross market benefit estimations based on favorable and unfavorable assumptions.

(b) How might these benefits change with geography/terrain, communication infrastructure, and transmission path?

(c) To what extent might DLR implementation shift congestion to new areas? How would these shifts in congestions patterns affect the overall benefits of DLR implementation?

(d) Please describe the method and assumptions used to estimate gross market benefits.

(Q13) If you have experience implementing (or evaluating the implementation of) DLRs, please describe your experience and, if applicable, explain your specific DLR design, installation, and operating decisions, choice of facilities on which to implement DLRs, the implications for reliability, and how such DLR implementation affected transmission transfer capability.

(Q14) What are the expected costs and challenges of implementing DLRs (separate from the costs associated with Order No. 881 implementation)?

(a) How are these costs and challenges divided between initial implementation (*e.g.,* sensor purchase and installation, EMS upgrades, and communications upgrades) and ongoing operations and maintenance (*e.g.,* sensor maintenance, communications maintenance, and forecasting)?

(b) How might these costs and challenges change with geography/terrain, communication infrastructure, and transmission path?

(c) Are there any published reports or studies assessing the costs, benefits and challenges of DLR implementation? If so, please identify and briefly describe these studies.

(d) Please identify any factors or situations that might cause DLR implementation to be prohibitively expensive, and please describe alternative implementation approaches that could limit those costs.

(e) Please describe any advantages or disadvantages related to costs and challenges to implementing DLRs concurrently with the requirements of Order No. 881 (as opposed to after Order No. 881 is implemented). For example, are the EMS and communication upgrades required to implement AARs sufficient to support the use of DLRs?

(Q15) Please describe the cybersecurity challenges of DLR implementation. What are the potential impacts to reliable operations if the digital devices that monitor or communicate line conditions used for establishing DLRs are manipulated or rendered inoperable by a cyber event? What relevant procedural or technical cybersecurity controls exist that would mitigate such risk?

(Q16) If the Commission were to require DLR implementation, should the Commission direct NERC to evaluate how this requirement could introduce new risks to the reliable operation of the BES and whether any standards require modification to address any risks?

D. Questions on the Nature of Potential DLR Requirements

11. DLRs are generally based on a combination of real-time measured data and various forecasts that are used to compute up-to-date transmission line ratings. The real-time measured data is typically gathered using field located sensors.

12. In their comments in the Order No. 881 proceeding, WATT suggested a requirement that transmission providers implement ''sensor-based DLRs'' in certain circumstances (*i.e.,* a requirement that transmission line ratings incorporate real-time data from field-based sensors on weather and/or transmission line parameters, such as sag, tension or temperature).[26] Alternatively, transmission line ratings could be based on up-to-date forecasts of additional weather input and/or transmission line parameter values.

13. The following questions seek information regarding potential approaches for a DLR requirement.

(Q17) If the Commission required DLRs in some circumstances, would it be appropriate to require transmission providers to calculate transmission line ratings based on up-to-date forecasts of additional weather factors beyond those required in Order No. 881? Why or why not? If so, please explain what additional factors (*e.g.,* wind speed, wind direction, solar irradiance (beyond day/night)) should be considered in transmission line rating calculations.

(Q18) To what extent would it be appropriate to rely on sensor-based measurements of line parameters[27] such as line sag, line tension, or conductor temperature in calculating line ratings, either in addition to, or in lieu of, forecasted weather factors described in Q17? In what circumstances should DLR approaches augment any sensor-based measurements of transmission line parameters with weather forecasts (*e.g.,* from the National Oceanic and Atmospheric Administration or another weather service)? To what extent are sensor-based measurements of line parameters useful in determining longer-term forecasted line ratings (*e.g.,* 2–7 days ahead), rather than just instantaneous or very short-term calculations of line ratings? How does the ability to forecast line ratings compare between DLR approaches that rely primarily upon sensor-based measurements of transmission line parameters and those that rely upon weather data?

(Q19) Should the Commission consider sensor-based DLR requirements, such as those suggested by WATT? If yes, what level of sensor coverage and performance requirements for such sensors should be required? Please explain whether the Commission would need to specify details like the types of sensors, how many are installed, what they measure, and the quality of their data? Would a sensor-focused requirement that specifies the types of technologies potentially become stale as DLR technologies evolve? Why or why not?

(Q20) In Order No. 881, the Commission adopted exceptions from the AAR requirements to ensure the safety and reliability of the transmission system and for transmission lines with transmission line ratings that are not affected by ambient air temperature or solar heating.[28] Please explain whether the Commission should adopt the same or similar exceptions for DLR requirements. Are there any different/other exceptions from the application of DLR

[23] BPA, Comments, Docket No. RM20–16–000, at 6 (filed Mar. 22, 2021).

[24] MISO Transmission Owners, Comments, Docket No. RM20–16–000, at 47 (filed Mar. 22, 2021) (deriving $1.5 billion by estimating $150,000 per line multiplied by 10,000 lines on the MISO system).

[25] SPP, Comments, Docket No. RM20–16–000, at 12 (filed Mar. 22, 2021).

[26] WATT, Comment, Docket No. RM20–16–000, at 10–11 (filed Mar. 22, 2021); ACPA/SEIA, Comments, Docket No. RM20–16–000, at 9–10 (filed Mar. 22, 2021).

[27] *See, e.g.,* LineVision, Comments, Docket No. RM20–16–000, at 2–3 (filed Mar. 22, 2021).

[28] Order No. 881, 177 FERC ¶ 61,179 at PP 227–228.

requirements that the Commission should consider? If so, what are these exceptions?

(Q21) In Order No. 881, the Commission established requirements for AARs to be applied to a period not greater than one hour and for AARs to be updated hourly.[29] Is this time resolution and calculation frequency also appropriate for DLR requirements or should an alternative approach be considered? Why?

(Q22) How might the Commission consider potential requirements for DLR implementation on transmission lines that are on the seam of multiple transmission provider service territories? What additional coordination between neighboring transmission owners and transmission providers, if any, might be necessary?

(Q23) In Order No. 881, the Commission required AARs to be used for near-term transmission service, defined as transmission service that ends not more than 10 days after the transmission service request date (*i.e.,* within the next 10 days).[30]

(a) Within what timeframes should the Commission require transmission providers to calculate transmission line ratings [31] using DLRs (on transmission lines for which DLRs are required)? Does this depend on which DLR approach (weather-based or line parameter-based) is used for a particular DLR implementation?

(b) For which transmission services (*e.g.,* hourly point-to-point transmission service, daily point-to-point transmission service, weekly point-to-point transmission service, etc.) should the Commission require the use of DLRs?

(c) What data on the accuracy of forecasting wind speed, wind direction, and/or other DLR variables would support the DLR implementation timeframes and transmission services you recommend above in (a) and (b)?

(Q24) If the Commission were to decide that a requirement to implement DLR is appropriate:

(a) Should the Commission limit the number or proportion of transmission elements that a transmission provider must implement DLRs on at any one time, even if such elements otherwise met the criteria for a DLR requirement? If so, should such a limit be based on a number or percentage of transmission elements, and if so, what number or percentage?

(b) Should the relevant transmission element for such a limit be considered individual transmission *lines,* or individual transmission *line-miles,* or some other unit? Or, if such a limit is necessary, would some other approach be better? Explain why you recommend any particular approach.

(c) Should such a limit be applied each time a transmission provider is required to evaluate whether DLRs need to be implemented on additional transmission lines (as contemplated below in Q29)?

(Q25) If changed circumstances result in a transmission line no longer meeting the DLR criteria, should the transmission provider continue to be required to use the DLR to calculate the rating for that line? Please explain why or why not.

E. Questions on Potential Timeframes for Implementing DLR Requirements

14. In Order No. 881, the Commission required AARs to be implemented no later than three years from the compliance filing due date.[32] The Commission explained that three years was consistent with the implementation schedule most commonly suggested by transmission owners for AAR implementation on priority transmission lines and that three years would be sufficient time for transmission owners and transmission providers to implement changes to their processes and systems to comply with the requirements adopted in the final rule.

(Q26) What would be the appropriate amount of time, either from your experience or by your estimation, necessary for each of the following DLR implementation steps identified below?

(a) Transmission line identification for DLR system application.

(b) DLR System design.

i. Field sensors and/or monitoring equipment design including specification, procurement, and installation.

ii. Communication infrastructure design, including specification, procurement, and installation.

iii. Process coordination between DLR field data and EMS, including any line rating database upgrades or necessary modifications.

iv. DLR system integration and testing.

(c) Any other steps needed to implement DLR system.

(Q27) Can any of the steps identified in Q26, be completed concurrently such that the total estimated DLR installation time might be faster than the sum of each step? If so, which steps can be completed concurrently? How might the implementation of Order No. 881 affect the time needed to implement DLR?

(Q28) If, after the initial implementation of DLRs, the transmission provider identifies additional transmission lines that meet the DLR criteria, how long would it take to implement DLRs on those additional transmission lines?

(Q29) If the Commission required DLRs in certain situations based on transmission line criteria, how frequently should transmission owners consider whether additional lines might meet the criteria for DLR implementation? That is, should the Commission require a periodic restudy of transmission systems to determine if additional transmission lines meet the criteria for DLR implementation? Please explain why or why not. If, during a periodic restudy, the transmission provider determines that additional lines meet the criteria for DLR implementation, when should the Commission require the transmission provider to implement DLRs on those additional lines?

III. Comment Procedures

15. The Commission invites interested persons to submit comments on the matters and issues proposed in this NOI, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due April 25, 2022 and Reply Comments are due May 25, 2022. Comments must refer to Docket No. AD22–5–000 and must include the commenter's name, the organization they represent, if applicable, and their address.

16. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word-processing formats. Documents created electronically using word-processing software should be filed in native applications or print-to-PDF format and not in a scanned or picture format. Commenters filing electronically do not need to make a paper filing.

17. Those unable to file electronically may mail comments via the U.S. Postal Service to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. Hand-delivered comments or comments sent via any other carrier should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

18. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

IV. Document Availability

19. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

20. From the Commission's Home Page on the internet, this information is

[29] *Id.* PP 162, 168. *See also Pro Forma* OATT attach. M, AAR Definition.

[30] Order No. 881, 177 FERC ¶ 61,179 at P 86.

[31] We clarify that we use the phrasing ''require transmission providers to calculate'' consistent with Order No. 881, in which the Commission clarified ''that hourly (or more frequent) querying of 'look-up tables' or similar pre-calculated AAR databases will satisfy the requirement that AARs be calculated at least each hour.'' *Id.* PP 141–142.

[32] *Id.* P 361.

available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

21. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Issued: February 17, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–03911 Filed 2–23–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER22–1065–000]

Rabbitbrush Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Rabbitbrush Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 9, 2022.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: February 17, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–03908 Filed 2–23–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–559–000.
Applicants: Chesapeake Energy Marketing, L.L.C., Continental Resources, Inc.
Description: Joint Petition For Temporary Waiver, et al. of Chesapeake Energy Marketing, L.L.C., et al.
Filed Date: 2/16/22.
Accession Number: 20220216–5106.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: RP22–560–000.
Applicants: Vector Pipeline L.P.
Description: Vector Pipeline L.P. submits Annual Report of Operational Purchases and Sales.
Filed Date: 2/16/22.
Accession Number: 20220216–5107.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: RP22–561–000.
Applicants: Rover Pipeline LLC.
Description: Compliance filing: Rover 2020 AMPS Filing to be effective N/A.
Filed Date: 2/16/22.
Accession Number: 20220216–5196.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: RP22–562–000.
Applicants: Rover Pipeline LLC.
Description: Compliance filing: Rover 2021 AMPS Filing to be effective N/A.
Filed Date: 2/16/22.
Accession Number: 20220216–5199.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: RP22–563–000.
Applicants: Midcontinent Express Pipeline LLC.
Description: § 4(d) Rate Filing: Removal of Expiring Targa Agreement to be effective 4/1/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5014.
Comment Date: 5 p.m. ET 3/1/22.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP21–1001–005.
Applicants: Texas Eastern Transmission, LP.
Description: Compliance filing: TETLP Rate Case Compliance Filing with EPC 2–2022—RP21–1001–000 to be effective 2/1/2022.
Filed Date: 2/16/22.
Accession Number: 20220216–5163.
Comment Date: 5 p.m. ET 2/23/22.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 17, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–03913 Filed 2–23–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD22–7–000]

Oil Pipeline Capacity Allocation Issues and Anomalous Conditions

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of inquiry.

SUMMARY: In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks comment on oil pipeline capacity allocation issues that arise when anomalous conditions affect the demand for oil pipeline capacity. In addition, the Commission seeks comment on what actions, if any, the Commission should consider to address those allocation issues.

DATES: Initial Comments are due April 25, 2022, and Reply Comments are due May 25, 2022.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through *http://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.
  - *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
  - *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Adrianne Cook (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8849, *Adrianne.Cook@ferc.gov*

Caitlin Tweed (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8073, *Caitlin.Tweed@ferc.gov*

SUPPLEMENTARY INFORMATION: 1. In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks to explore oil pipeline capacity allocation issues that arise when anomalous conditions affect the demand for oil pipeline capacity and what actions, if any, the Commission should consider to address those allocation issues. Specifically, the Commission seeks public comment on anomalous conditions and their potential impacts on oil pipeline capacity allocation, as well as whether there are changes to the Commission's existing policies (such as those regarding prorationing) that the Commission should consider to mitigate these impacts. The Commission also seeks comment on the effects of recent anomalous conditions—those arising from the COVID–19 pandemic—on the availability of pipeline capacity for transporting jet fuel.

I. Background

A. Allocation of Capacity

2. Interstate oil pipelines are regulated as common carriers subject to the Interstate Commerce Act (ICA).[1] Accordingly, oil pipeline rates, terms, and conditions of service must be just and reasonable [2] and non-discriminatory.[3] Furthermore, an oil pipeline is obligated to provide transportation upon reasonable request.[4]

3. Prorationing is the mechanism that oil pipelines use to allocate capacity among shippers when their total nominations exceed the pipeline's capacity. The Commission does not prescribe a uniform prorationing methodology, but a pipeline's methodology must be consistent with the ICA.[5]

4. Historically, oil pipelines have employed two general types of prorationing methodologies: Pro rata and history-based. A pro rata methodology awards available capacity to shippers in proportion to their nominations each nomination cycle, regardless of how much service, if any, they have taken in the past.[6] In contrast, a history-based methodology gives preference to shippers with a history of shipping on the pipeline.[7] However, the Commission has required pipelines using this methodology to allow all shippers the opportunity to develop a record of transportation on the pipeline so as to attain preferred historical shipper status.[8] When a pipeline uses a history-based methodology, it must reserve a portion of its capacity for new shippers.[9]

B. Anomalous Conditions

5. Oil pipelines serve a critical function transporting crude oil, refined products,[10] and natural gas liquids.[11] Pipelines move crude oil from production areas to refineries and refined products to markets for consumption. Pipeline transportation is often more convenient and more cost-effective than alternative forms of transportation. Many pipelines offer transportation of more than one kind of product, often using a batching system to differentiate between products on the system.

6. As explained above, pipeline prorationing policies determine which shippers may access the pipeline when shipper demand exceeds pipeline capacity. These prorationing policies are often important during anomalous conditions that may cause sudden and unexpected changes to the demand for pipeline capacity. Anomalous conditions can result from a number of circumstances, including, but not limited to, extreme weather, national emergencies, and major market disruptions. Anomalous conditions can significantly and suddenly increase shipper nominations above available

[1] 49 U.S.C. app. 1 (1988).

[2] *Id.* § 15(1).

[3] *Id.* § 3(1).

[4] *Id.* § 1(4).

[5] *Suncor Mktg. Inc.* v. *Platte Pipe Line Co.,* 132 FERC ¶ 61,242, at P 24 (2010).

[6] *Id.* P 26. In a simplified example, if a pipeline's available capacity per cycle is 100 barrels and Shipper A and Shipper B each nominate 100 barrels, each shipper would be allocated 50 barrels. If in the next cycle, Shippers A and B each nominate 100 barrels again, but new Shippers C and D also each nominate 100 barrels, each shipper would be allocated 25 barrels.

[7] *Id.* P 25. In a simplified example, assume that a pipeline's available capacity per cycle is 100 barrels and that Shipper A and Shipper B each nominate 100 barrels. Assume also that, over the prior 12 months, Shipper A shipped 900 barrels and Shipper B shipped 300 barrels. If Shipper A and Shipper B each nominate 100 barrels in a particular cycle, then Shipper A would be allocated 75 barrels of the 100 available barrels of capacity (reflecting its historical usage of 75% of total usage over the past year) and Shipper B would be allocated 25 barrels of the 100 available barrels of capacity (reflecting its historical usage of 25% of total usage over the past year).

[8] *See Colonial Pipeline Co.,* 156 FERC ¶ 61,001, at PP 19–24 (2016); *Suncor,* 132 FERC ¶ 61,242 at P 25; *Platte Pipe Line Co.,* 117 FERC ¶ 61,296, at P 46 (2006).

[9] *See Colonial,* 156 FERC ¶ 61,001 at P 24; *Platte,* 117 FERC ¶ 61,296 at P 56.

[10] Refined petroleum products include motor gasoline, jet fuel, diesel, naphtha, and kerosene.

[11] Natural gas liquids include propane, butane, ethane, and natural gasoline.

pipeline capacity. Likewise, anomalous conditions can temporarily reduce some shippers' usage of the pipeline system. Under these circumstances, if demand subsequently increases above pipeline capacity, prorationing policies must address the allocation of pipeline capacity among different shippers whose most recent shipping histories may not reflect their longer-term historical usage.

7. The COVID–19 pandemic significantly affected jet fuel shippers' demand for oil pipeline capacity, although it reduced demand rather than increasing it. For example, at a July 2020 technical conference discussing the serious impacts that emergency conditions caused by the COVID–19 pandemic were having on the energy industry, one panelist raised concerns regarding jet fuel shippers' ability to access capacity on oil pipelines using history-based prorationing due to a disproportionate decrease in jet fuel consumption during the COVID–19 pandemic.[12] Then, in July 2021, certain jet fuel shippers filed a request for emergency relief, asking the Commission to direct SFPP to prioritize jet fuel shipments on its North Line to Reno-Tahoe International Airport to prevent jet fuel shortages.[13]

8. As reflected in these proceedings, Airlines [14] have raised capacity allocation issues related to the COVID–19 pandemic's effects on demand for jet fuel shipments and subsequent effects on pipeline allocation.[15] After demand for air travel declined due to the start of the pandemic in March 2020, Airlines state that they reduced shipments of jet fuel on several multi-product pipelines that supply airports.[16] Because these pipelines use history-based prorationing, Airlines claim that their decreased shipments during the pandemic reduced the future capacity allocated to them.[17] Airlines state that this reduction harms their ability to continue to self-supply jet fuel using their shipper history on pipelines as they did prior to the pandemic. They state that fuel is a major cost and that self-supply enables them to better control fuel costs.[18]

II. Discussion

9. In this proceeding, we seek comment on oil pipeline capacity allocation issues that arise under anomalous conditions, including the availability of pipeline capacity for transporting jet fuel to supply airports following the onset of the COVID–19 pandemic. We also seek comment on whether there are any actions the Commission should consider that would mitigate the effects of anomalous conditions on oil pipeline capacity allocations, including the effects of the COVID–19 pandemic on demand for pipeline capacity to airport destinations.

A. Capacity Allocation Issues Arising Under Anomalous Conditions

A1. Using specific historical examples, please describe any anomalous conditions that have affected demand for, and thus shipper access to, pipeline capacity. In discussing each example, commenters should (a) generally describe the differential between the shipper's nominations and actual, pro-rated shipments, (b) describe how long the anomalous conditions existed, (c) explain whether the anomalous conditions continued to affect pipeline access even after the anomalous conditions concluded, and (d) describe whether and to what extent the shipper was able to use transportation alternatives (*e.g.,* trucking) or other means to compensate for the difference between its nominations and actual, pro-rated shipments.

A2. Do current prorationing policies sufficiently address the allocation of capacity during and after anomalous conditions? For commenters responding that current prorationing policies are insufficient, please explain how current prorationing policies are insufficient and describe any aspects of current prorationing policies that pose particular problems or impediments.

A3. Are there any actions the Commission should consider that would mitigate the effects of anomalous conditions on pipeline capacity allocations? To the extent the Commission considers changes to prorationing policies to address capacity allocation issues under anomalous conditions, should the Commission consider alternatives to history-based prorationing and pro rata allocations? Or should the Commission instead modify existing capacity allocation methodologies? In proposing any potential actions, please describe how such actions would be consistent with the ICA.

A4. Please describe the current availability of secondary transactions for acquiring shipper history [19] or for otherwise obtaining access to pipeline capacity outside a pipeline's nomination and prorationing process. Please describe any experience with, and the practical implications of, using such secondary transactions to mitigate the impacts of anomalous conditions. Please also explain whether and, if so, how the availability of secondary transactions could be enhanced or expanded to improve shipper access to pipeline capacity during anomalous conditions.

---

[12] *See Impacts of COVID–19 on the Energy Industry,* Docket No. AD20–17–000, Tr. 222–224, 242–246 (O'Mahoney); *see also* Comment of Delta Air Lines, Inc., Docket No. AD20–17–000 (submitted June 30, 2020). Additionally, in May 2021, SFPP, L.P. (SFPP) proposed a temporary change to its prorationing policy that would allow jet fuel shippers to obtain new shipper space as well as regular shipper space. This filing was protested, and SFPP subsequently withdrew it. *SFPP, L.P.,* Tariff Filing, Docket No. IS21–322–000 (submitted May 11, 2021; withdrawn June 1, 2021).

[13] The jet fuel shippers that filed the request for emergency relief included Airlines for America, Reno-Tahoe Airport Authority, Alaska Air Group, Inc., Allegiant Air, American Airlines, Inc., Delta Air Lines, Inc., Federal Express Corp., Frontier Airlines, JetBlue Airways Corp., National Air Carrier Assoc., Southwest Airlines Co., and World Fuel Services, Inc. *Airlines for America,* Request for Emergency Relief, Docket No. OR21–10–000 (submitted July 26, 2021) (Request for Emergency Relief). The Commission denied the request because the petition did not establish that the circumstances rose to the level of a public health emergency warranting extraordinary relief under § 1(15) of the ICA. *Airlines for Am.,* 176 FERC ¶ 61,065, at PP 14–16 (2021).

[14] As used herein, ''Airlines'' refers to various jet fuel shippers that supply airports, primarily airlines, and their trade association, Airlines for America.

[15] *See, e.g.,* Airlines for America, Motion to Intervene, Docket No. IS21–322–001 (filed May 27, 2021); Airlines for America, Request for Emergency Relief, Docket No. OR21–10–000 (filed July 26, 2021).

[16] *See* Airlines for America, Request for Emergency Relief, Docket No. OR21–10–000, at 2 (filed July 26, 2021) (''[D]emand for air travel radically decreased at the start of the COVID–19 pandemic and remained depressed throughout 2020 and into early 2021. Consequently, shipments of jet fuel on interstate pipelines . . . significantly decreased as well.''); Airlines for America, Motion to Intervene, Docket No. IS21–322–001, at 2–3 (filed May 27, 2021) (''While demand for air travel was depressed, airlines were unable to meet their minimum shipping requirements and nominate future volumes in accordance with their line space history.'').

[17] For example, SFPP's prorationing policy provides that 95% of its capacity shall be allocated to regular shippers based on each shipper's average historical shipments over a rolling 12-month base period. SFPP, L.P., Proration Policy dated June 1, 2019, at 1, 3, *available at https://www.kindermorgan.com/item/Policy/SFPP%20Policy/1.*

[18] *Impacts of COVID–19 on the Energy Industry,* Docket No. AD20–17–000, Tr. 222–224 (O'Mahoney); *Airlines for America,* Request for Emergency Relief, Docket No. OR21–10–000 (filed July 26, 2021).

[19] Under a history transfer, a shipper's credit for accumulated shipping history on a particular pipeline could be transferred to another shipper in exchange for payment. The replacement shipper could then nominate on the pipeline during prorationing using the shipper history of the selling shipper, thereby obtaining a higher allocation than it otherwise might be entitled to.

B. Access to Capacity for Transporting Jet Fuel Following the Onset of the COVID–19 Pandemic

B1. In the context of the Airline-specific issues that have been raised to the Commission, please identify any pipelines and the destination airports where Airlines anticipate receiving capacity for moving jet fuel in 2022 or 2023 that is both (a) below pre-pandemic levels and (b) below Airlines' anticipated fuel needs, notwithstanding Airlines' efforts to mitigate the pipeline's capacity constraints.[20]

B2. Are there pipelines transporting jet fuel that were not in prorationing at any time over the past 12 months that would have been in prorationing had jet fuel volumes shipped at 2019 levels? If so, for each nomination cycle (or month) in which the pipeline would have been in prorationing, please describe the degree to which nominations would have exceeded capacity to the extent possible.

B3. Regarding pipelines identified in response to B1, please provide both historical and projected levels of total jet fuel demand at the airport destinations, aggregate jet fuel nominations to each airport destination, and aggregate pipeline capacity awarded for jet fuel movements to each airport destination, beginning with January 2018.[21]

B4. For pipelines that transport jet fuel, please provide the pipeline's current total capacity for shipments of all products at destinations serving airports and any changes to total capacity that occurred since January 2018.

B5. Regarding products other than jet fuel transported on pipelines serving airport destinations, please provide data showing how aggregate product nominations and aggregate pipeline capacity awarded for each product have changed during the COVID–19 pandemic. Please discuss any specific shifts in product demand that caused these changes. In addition, please provide information regarding how sudden demand shifts have affected pipeline capacity allocations for some products to the detriment of others, including jet fuel.

B6. Please describe any action that the Commission should consider to address concerns regarding oil pipeline capacity to airport destinations. Such actions could include broader policy changes, as discussed in Section A above, or proposals specifically designed to address the capacity allocation issues that have arisen due to the effects of the COVID–19 pandemic on demand for jet fuel shipments. For example, should the Commission consider adjustments to existing capacity allocation methodologies to enhance shippers' ability to transfer their history or otherwise transfer capacity rights to mitigate the impacts of the COVID–19 pandemic? In proposing any potential actions, please describe how such actions would be consistent with the ICA.

B7. Please describe whether expansions of capacity on the pipelines serving airport destinations would help address current and future jet fuel needs. Please identify whether any of the pipelines serving airports were in prorationing in the 12 months prior to March 2020. Please explain in detail the extent of the capacity constraints on these pipelines and discuss whether expansions of pipeline capacity are necessary to avoid continued prorationing going forward.

III. Comment Procedures

10. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Initial Comments are due April 25, 2022, and Reply Comments are due May 25, 2022. Comments must refer to Docket No. AD22–7–000, and must include the commenter's name, the organization they represent, if applicable, and their address. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

11. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

12. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

IV. Document Availability

13. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

14. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

15. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission. Commissioner Danly is concurring with a separate attached.

Issued: February 17, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

Department of Energy

Federal Energy Regulatory Commission

Oil Pipeline Capacity Allocation Issues and Anomalous Conditions, Docket No. AD22–7–000

DANLY, Commissioner, *concurring:*

1. I concur because the Commission always has discretion to issue a Notice of Inquiry (NOI) on any topic within its purview. I also concur because I agree that we recently faced a potential jet fuel shortage driven, at least in part, by the mechanisms in our pipeline tariffs. I write separately to express three concerns.

2. *First,* it is my view that the Commission should only issue notices of inquiry when there is a problem that in fact may need to be resolved and can be done so by the

[20] Mitigation could include increased trucking, tankering, and other attempts to obtain fuel supplies.

[21] Although an individual shipper may not have complete information regarding pipeline capacity, a shipper could provide information related to its own nominations and capacity or could work with other shippers to provide aggregate information.

Commission. I do not believe that to be the case here.

3. Today's NOI characterizes the problem as whether oil pipeline allocation methodologies sufficiently address anomalous conditions and identifies only one instance where this problem has occurred: ''effects of the COVID–19 pandemic on demand for pipeline capacity to airport destinations.'' [1] The NOI does not show airlines as having raised concerns since July 2021 when certain airlines filed a request for emergency relief.[2] Airlines are not shy before the Commission. If there were still a problem, we would have heard from them.[3]

4. *Second,* while I again acknowledge that we had a particular problem with supplies of jet fuel in 2021, as a general matter, I am wary of any action wherein the Commission singles out a particular shipper category as the basis for exploring changes to its policies and tariffs.[4] This is especially true when, as here, we have not even made the most preliminary of showings that this shipper category is not similarly situated with other shippers, nor have we identified some other legitimate factor that justifies disparate treatment.[5] As commenters in response to the July 2021 request for relief stated: ''All industries and shipper classes faced unprecedented demand destruction during the COVID–19 pandemic. All shippers faced challenges and choices to manage the downturn and prepare for the upcoming period when demand will return.'' [6]

5. *Third,* I am not confident that carriers will willingly provide the information the Commission requests on destinations, nominations, and capacity awarded.[7] Section 15(13) of the Interstate Commerce Act prohibits common carriers from disclosing: any information concerning the nature, kind, quantity, destination, or consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor . . . .[8]

6. While I acknowledge the Commission attempts to strategically deploy the word ''aggregate,'' I do not think that this maneuver is sufficient. Oil pipelines that deliver to airport destinations in many cases only have a few shippers, meaning that, even if data is ''aggregated,'' it is not difficult to discern individual shipper data. And even so, I could imagine some shippers arguing that the information, aggregated or not, might be used to their detriment or prejudice.

For these reasons, I respectfully concur.

James P. Danly,

Commissioner.

[1] *Oil Pipeline Capacity Allocation Issues and Anomalous Conditions,* 178 FERC ¶ 61,105, at P 9 (2022) (Oil Pipeline Allocation NOI).

[2] *Id.* P 7.

[3] *See also* Chief Administrative Law Judge, Final Status Report, Conference to Discuss Resolution of Jet Fuel Issues at the Reno-Tahoe International Airport, Docket No. AD21–16–000, at PP 2–3 (Aug. 25, 2021) (''The long-term concerns raised regarding jet fuel capacity are too speculative at this time for the parties to a find a consensual resolution in this form . . . it is determined that the participants are at an impasse regarding long term remedies . . . . Going forward, based on a general assessment of the matters at issue, the attendees and other concerned entities would be well advised to continue discussions, in their regular course of business. It seems beneficial for all entities to keep open lines of communication to identify issues or disputes before they arise, and to engage in dialogue on how to best obtain optimal commercial resolution of what they perceived to be issues in this matter.''). *But see Hearing to Review Admin. of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Nat'l Res.,* 117th Cong. (2021) (responding to Senator Cortez Masto on 2021 jet fuel shortages, ''I think this issue of historical use needs to be addressed. I raised this as an issue in a technical conference we had earlier in the year. I think we need a different approach to allocating capacity because of different anomalies. And you have my commitment that we will take a look at that and hopefully act before next summer's demand peak'') (statement of Richard Glick, Chairman of the Fed. Energy Regulatory Comm'n), *https://www.energy.senate.gov/hearings/2021/9/full-committee-hearing-to-review-administration-of-laws-within-ferc-jurisdiction.*

[4] I also note that the NOI solicits information not related to the anomalous conditions problem. *Id.* P 9, Question B.7 (''Please describe whether expansions of capacity on the pipelines serving airport destinations would help address current and future jet fuel needs.'').

[5] *See* 49 App. U.S.C. 3 (1988) (prohibiting undue preference).

[6] Pilot Travel Centers LLC, et al., Joint Motion to Intervene and Protest, Docket No. OR21–10–000, at 3 (Jul. 27, 2021); *see also* Chevron Products Co., et al., Response to Request for Emergency Relief under Section 1(15) of the Interstate Commerce Act, Docket No. OR 21–10–000, at 2 (Jul. 28, 2021) (''The Commission should ask whether the Request is seeking to prioritize jet fuel and those who can afford to access air travel at the expense of supplying transportation fuels that affect many more people and their daily lives as they go to work, daycare, school, and deliver goods and services in support of their communities.'').

[7] *See* Oil Pipeline Allocation NOI, 178 FERC ¶ 61,105 at P 9, Question B.3 (''[P]lease provide . . . aggregate jet fuel nominations to each airport destination, and aggregate pipeline capacity awarded for jet fuel movements to each airport destination . . . .''); *id.* Question B.5 (''Regarding products other than jet fuel transported on pipelines serving airport destinations, please provide data showing how aggregate product nominations and aggregate pipeline capacity awarded for each product have changed during the COVID–19 pandemic.'').

[8] 49 App. U.S.C. 15(13) (1988).

[FR Doc. 2022–03912 Filed 2–23–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–51–000]

CNG Holding 1 LLC; Notice of Petition for Declaratory Order

Take notice that on February 11, 2022, pursuant to Rule 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, CNG HOLDING 1 LLC (CNG Holding) filed a petition for declaratory order requesting the Commission issue an order stating that CNG Holding's: (1) Proposed compressed natural gas (CNG) production facility; (2) the docks from which CNG Holding will export the CNG; and (3) CNG Holding's proposal to construct an on-site truck fueling station, a bunkering pipeline to transport end-use fuel to vessels, and provide an industrial fueling service to industrial customers in Louisiana are not subject to the Commission's jurisdiction under section 3 or section 7 of the Natural Gas Act, 15 U.S.C. 717b, 717f (2018).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on March 14, 2022.

Dated: February 17, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–03910 Filed 2–23–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC22–41–000.
Applicants: Buckeye Plains Solar Project, LLC, Buckeye Plains II Solar Project, LLC, Pickaway County Solar Project, LLC, Pickaway County II Solar Project, LLC, Dominion Solar Projects VII, Inc.
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Buckeye Plains Solar Project, LLC, et al.
Filed Date: 2/17/22.
Accession Number: 20220217–5135.
Comment Date: 5 p.m. ET 3/10/22.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG22–56–000.
Applicants: Corazon Energy Services, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator of Corazon Energy Services, LLC.
Filed Date: 2/17/22.
Accession Number: 20220217–5144.
Comment Date: 5 p.m. ET 3/10/22.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2564–011; ER10–2600–011; ER10–2289–011; EL22–5–000.
Applicants: Tucson Electric Power Company, UniSource Energy Development Company, UNS Electric, Inc., Tucson Electric Power Company.
Description: Amendment to June 21, 2021 Notice of Non-Material Change in Status of Tucson Electric Power Company, et al.
Filed Date: 2/14/22.
Accession Number: 20220214–5277.
Comment Date: 5 p.m. ET 3/7/22.

Docket Numbers: ER10–2564–011; ER10–2600–011; ER10–2289–011; EL22–5–000.
Applicants: Tucson Electric Power Company, UniSource Energy Development Company, UNS Electric, Inc., Tucson Electric Power Company.
Description: Amendment to June 21, 2021 Notice of Non-Material Change in Status of Tucson Electric Power Company, et al.
Filed Date: 2/15/22,
Accession Number: 20220215–5239.
Comment Date: 5 p.m. ET 3/7/22.

Docket Numbers: ER22–516–002.
Applicants: Arizona Public Service Company.
Description: Tariff Amendment: Service Agreement No. 396 Amendment to be effective 11/29/2021.
Filed Date: 2/17/22.
Accession Number: 20220217–5096.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1066–000.
Applicants: Southern California Edison Company.
Description: Tariff Amendment: Notice of Cancellation EDP Ltr Agreement SCE and VESI 12 LLC SA No. 1133 to be effective 4/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5003.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1067–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2022–02–17_SA 3500_METC-Calhoun County Solar 1st Rev GIA (J857) to be effective 2/7/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5052.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1068–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: § 205(d) Rate Filing: Amendment to Service Agreement No. 891 to be effective 1/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5056.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1069–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Bylaws Revisions to Remove Requirement that Chair of the SPP Board Serve on SPC to be effective 4/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5057.
Comment Date: 5 p.m. ET 3/10/22,

Docket Numbers: ER22–1070–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2022–02–17 EIM Implementation Agreement Cancellation-Public Service of Colorado to be effective 4/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5064.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1071–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Revisions to Bylaws Preamble to Incorporate the SPP Value Proposition to be effective 4/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5074.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1072–000.
Applicants: New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
Description: § 205(d) Rate Filing: New York Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: Joint 205 filing unexecuted LGIA among NYISO, NMPC, East Point (SA 2683) to be effective 2/18/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5095.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1073–000.
Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: Niagara Mohawk Power Corporation submits tariff filing per 35.13(a)(2)(iii: 205 filing among NYISO, NMPC, High River unexecuted LGIA (SA 2682) to be effective 2/18/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5098.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1074–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Second Revised ISA, SA No. 1767; Queue No. AB2–102 to be effective 1/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5133.
Comment Date: 5 p.m. ET 3/10/22.

Docket Numbers: ER22–1075–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2022–02–17_SA 3781 Ameren-Pana Solar FSA (J912) to be effective 4/19/2022.
Filed Date: 2/17/22.
Accession Number: 20220217–5142.
Comment Date: 5 p.m. ET 3/10/22.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 17, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–03909 Filed 2–23–22; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[CERCLA–04–2022–2503; FRL–9476–01–R4]

Welch Group Environmental Fair Play Superfund Site Fair Play, South Carolina; Notice of Proposed Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement.

SUMMARY: Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency is proposing to enter into an Administrative Settlement Agreement with The Feltman Family Trust of 2009. Concerning the Welch Group Environmental Fair Play Superfund Site located in Fair Play, South Carolina. The settlement addresses recovery of CERCLA costs for a cleanup action performed by the EPA at the Site.

DATES: The Agency will consider public comments on the proposed settlement until March 28, 2022. The Agency will consider all comments received and may modify or withdraw its consent to the proposed settlement, if comments received disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper or inadequate.

ADDRESSES: Copies of the proposed settlement are available from the Agency by contacting Ms. Paula V. Painter, Program Analyst, using the contact information provided in this notice. Comments may also be submitted by referencing the Site's name through one of the following methods:

Internet: https://www.epa.gov/aboutepa/about-epa-region-4-southeast#r4-public-notices.

Email: Painter.Paula@EPA.gov.

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at (404) 562–8887.

Maurice L. Horsey, IV,

Chief, Enforcement Branch, Superfund & Emergency Management Division.

[FR Doc. 2022–03857 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2022–0223; FRL–9600–01–OCSPP]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by the registrant to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrant withdraws its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled, only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before March 28, 2022.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2022–0223, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Registration Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. ATTN: Christopher Green.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Christopher Green, Registration Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2707; email address: *green.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/comments.html.*

II. What action is the Agency taking?

This notice announces receipt by EPA of requests from a registrant to cancel 7969–430 and 7969–432 pesticide products registered under FIFRA section 3 (7 U.S.C. 136a) or 24(c) (7 U.S.C. 136v(c)). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrant withdraws their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name	Active ingredients
7969–430	7969	Tirexor Herbicide Technical	Trifludimoxazin.
7969–432	7969	Tirexor Herbicide	Trifludimoxazin.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
7969	BASF Corporation Division Name: Agricultural Products, 26 Davis Drive, Research Triangle Park, NC 27709–3528.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrant in Table 2 of Unit II, has requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. For this voluntary cancellation request, the registrant indicates that the products listed in Table 1 of Unit II are not in the channels of trade because they were never commercialized in the United States. Therefore, no existing stocks provision is needed. The cancellation will be effective on the date of publication of the cancellation order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1 of Unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 17, 2022.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2022–03929 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–SFUND–2015–0100; FRL–9341–01–OLEM]

Proposed Information Collection Request; Comment Request; Renewal of Information Collection Request for the Continuous Release Reporting Requirement Including Analysis for Use of Continuous Release Reporting Forms, EPA ICR No. 1445.15, OMB Control Number 2050–0086

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Renewal of Information Collection Request for the Continuous Release Reporting Requirement Including Analysis for Use of Continuous Release Reporting Forms'' (EPA ICR No. 1445.15, OMB Control No. 2050–0086) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described in **SUPPLEMENTARY INFORMATION.** This is a proposed extension of the ICR, which is currently approved through November 30, 2022. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before April 25, 2022.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–SFUND–2015–0100, to: (1) EPA online using *www.regulations.gov* (our preferred method), by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Wendy Hoffman, Office of Emergency Management, Mail Code 5104A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–8794; email address: *hoffman.wendy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *http://www.regulations.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room is closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information about the EPA's public docket, Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is 202–566–1744.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: Pursuant to section 3506(c)(2)(A) of the PRA, in the first FR notice published on May 30, 2018, EPA solicited comments and information pertaining to the Continuous Release Reporting Requirements (CRRR) under Section 103(a) of CERCLA, as amended. CRRR requires the person in charge of a vessel or facility immediately to notify the National Response Center (NRC) of a hazardous substance release into the environment if the amount of the release equals or exceeds the substance's reportable quantity (RQ). The RQ of every hazardous substance can be found in Table 302.4 of 40 CFR 302.4. If the source and chemical composition of the continuous release do not change and the level of the continuous release does not significantly increase, a follow-up written report to the EPA Region one year after submission of the initial written report is also required. The person in charge must notify the NRC and EPA Region of a change in the source or composition of the release, and under section 103(a) of CERCLA, a significant increase must be reported immediately to the NRC. Finally, any change in information submitted in support of a continuous release notification must be reported to the EPA Region. Section 103(f)(2) of CERCLA provides facilities relief from per-occurrence notification release requirements if the subject release is continuous and stable in quantity and rate.

The Continuous Release Reporting Requirement allows the Federal government to determine whether a Federal response action is required to control or mitigate any potential adverse effects to public health, welfare or the environment. The release information is also available to EPA program offices and other Federal agencies that evaluate the potential need for additional regulations, new permitting requirements for specific substances or sources, or improved emergency response planning. State and local government authorities and facilities subject to the CRRR use release information for local emergency response planning. The public, which has access to release information through the Freedom of Information Act, may request release information on what types of releases are occurring in different localities and what actions, if any, are being taken to protect public health, welfare and the environment. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The burden estimates, numbers and types of respondents, wage rates and unit and total costs for this ICR renewal will be revised and updated, if needed, during the 60-day comment period while the ICR Supporting Statement is undergoing review at OMB.

Form Numbers: EPA Form 6100–10, Continuous Release Reporting Form.

Respondents/affected entities: Entities potentially affected by this action are not defined. The use and release of hazardous substances are pervasive throughout industry. EPA expects many different industrial categories to report hazardous substance releases under the provisions of the CRRR. No one industry sector or group of sectors is disproportionately affected by the information collection burden.

Respondent's obligation to respond: Mandatory if respondents want reduced reporting for continuous releases. See the abstract for details.

Estimated number of respondents: 4,192.

Frequency of response: On occasion.

Total estimated burden: 334,472 hours (average per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $19,797,899 (average per year), including $243,200 annualized capital or operation & maintenance costs (average per year).

Changes in estimates: Any change in burden or cost resulting from the 60-day OMB review period will be described and explained in this section when the updated ICR Supporting Statement is completed.

Donna Salyer,

Director, Office of Emergency Management.

[FR Doc. 2022–03861 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2021–0674; FRL–9566–01–OGC]

Proposed Stipulated Partial Settlement Agreement, Endangered Species Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed stipulated settlement agreement; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a second proposed stipulated partial settlement agreement that resolves the *Center for Environmental Health, et al.,* v. *Wheeler, et al.,* case in the United States District Court for the Northern District of California (4:18–cv–03197) that alleges that EPA and the United States Fish and Wildlife (FWS) failed to comply with certain procedural and substantive duties under the Endangered Species Act (ESA). Defendant-Intervenor joins this proposed stipulated partial settlement agreement.

DATES: Written comments on the proposed stipulated partial settlement agreement must be received by *March 28, 2022.*

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2021–0674, online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Additional Information about Commenting on the Proposed Settlement Agreement'' heading under the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov,* as there may be a delay in processing mail and faxes. Hand-deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

FOR FURTHER INFORMATION CONTACT: Michele Knorr, Pesticides and Toxic Substances Law Office MC–2333A, Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone (202) 564–5631; email address *knorr.michele@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Settlement Agreement

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2021–0674) contains a copy of the proposed settlement agreement.

The electronic version of the public docket for this action contains a copy of the proposed settlement agreement and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

II. Additional Information About the Proposed Settlement Agreement

Prior to this lawsuit being filed, on January 18, 2017, EPA submitted to FWS a nationwide biological evaluation regarding the effects of malathion and two other pesticide active ingredients on species listed as threatened or endangered under the ESA, 16 U.S.C. Section 1531 *et seq.,* and their designated critical habitats and requested initiation of consultation pursuant to ESA Section 7(a)(2), 16 U.S.C. Section 1536(a)(2) (the Malathion Consultation). The Malathion Consultation has been ongoing since that date.

Plaintiffs filed their original case in May 2018, and amended the complaint on July 25, 2018, and on November 27, 2018, alleging that: (1) EPA violated its procedural duty under ESA Section 7(a)(2) to complete consultation and its substantive duty under ESA Section 7(a)(2) to avoid jeopardy with respect to 21 malathion-containing pesticide product registrations under the Federal Insecticide Fungicide, and Rodenticide Act (FIFRA), and the FWS violated its procedural duty to complete consultation under ESA Section 7(a)(2); (2) these failures constitute unlawfully withheld or unreasonably delayed agency action in violation of Section 706(1) of the Administrative Procedure Act, 5 U.S.C. Section 706(1); and (3) EPA failed to comply with ESA Section 7(d) when it ''maintained the registrations of these same pesticide products and continued to reregister and register pesticide products containing malathion.''

On January 4, 2022, the court entered the first stipulated partial settlement agreement that resolved part of this case. Specifically, unless one of the contingencies set forth in settlement agreement occurs (which may result in an extension of time), FWS will issue its Final Biological Opinion and conclude the Malathion Consultation no later than February 28, 2022.

The remaining part of this case involves the substantive claims under ESA section 7(a)(2) against EPA. This second proposed partial settlement agreement states that, unless one of the contingencies set forth in settlement agreement occurs (which may result in an extension of time), EPA will implement specific portions of the Final Biological Opinion no later than 18 months from the date that FWS issues the Final Biological Opinion. Implementation will include, but is not limited to, providing to all registrants of products containing malathion written notice of the issuance of the Final Biological Opinion no later than 60 calendar days from its issuance, as well as notice of any actions the malathion registrants must take (including to require submission of requests to amend labeling or terms and conditions of registration).

Court approval of this proposed stipulated partial settlement agreement would result in the dismissal with prejudice of the remaining claims. Defendant-Intervenor joins this proposed settlement agreement.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed stipulated partial settlement agreement from persons who are not named as parties to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed stipulated partial settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the ESA or FIFRA. Unless EPA or the Department of Justice determines that consent should be withdrawn, the terms of the proposed stipulation and stipulated notice of dismissal will be affirmed.

III. Additional Information About Commenting on the Proposed Settlement Agreement

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2021–0674, via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For additional information about submitting information identified as CBI, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

Christopher E. Kaczmarek,

Acting Associate General Counsel.

[FR Doc. 2022–03927 Filed 2–23–22; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2022–3003]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. Government-wide policy requires all Federal employees to be vaccinated against COVID–19, with exceptions only as required by law. Employees may seek a legal exception to the vaccination requirement due to a disability, using the reasonable accommodation Form. The agency may also ask for other information, as needed. Requests for ''medical accommodation'' or ''medical exceptions'' will be treated as requests for a disability accommodation and evaluated and decided under applicable Rehabilitation Act standards for reasonable accommodation absent undue hardship to the agency.

DATES: Comments must be received on or before March 28, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 21–03) or by email to *Nakia.Burton@exim.gov,* or by mail to Nakia Burton, Export-Import Bank, 811 Vermont Ave. NW, Washington, DC 20571. The information collection tool can be reviewed at: eib21–03.pdf (*exim.gov*).

FOR FURTHER INFORMATION CONTACT: To request additional information, please Nakia Burton *nakia.burton@exim.gov,* 202–565–3225.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 21–03 REQUEST FOR A MEDICAL EXCEPTION TO THE COVID–19 VACCINATION REQUIREMENT.

OMB Number: 3048–xxxx.

Type of Review: Regular.

Need and Use: The information collected will allow EXIM to determine compliance and content for transaction requests submitted to the Export-Import Bank under its insurance, guarantee, and direct loan programs.

A Notice Regarding Injunctions: The vaccination requirement issued pursuant to E.O. 14043, is currently the subject of a nationwide injunction. While that injunction remains in place, EXIM will not process requests for a medical exception from the COVID–19 vaccination requirement pursuant to E.O. 14043. EXIM will also not request the submission of any medical information related to a request for an exception from the vaccination requirement pursuant to E.O. 14043 while the injunction remains in place. But EXIM may nevertheless receive information regarding a medical exception. That is because, if EXIM were to receive a request for an exception from the COVID–19 vaccination requirement pursuant to E.O. 14043 during the pendency of the injunction, EXIM will accept the request, hold it in abeyance, and notify the employee who submitted the request that implementation and enforcement of the COVID–19 vaccination requirement pursuant to E.O. 14043 is currently enjoined and that an exception therefore is not necessary so long as the injunction is in place. In other words, during the pendency of the injunction, any information collection related to requests for medical exception from the COVID–19 vaccination requirement pursuant to E.O. 14043 is not undertaken to implement or enforce the COVID–19 vaccination requirement.

Affected Public: This form affects EXIM employees.

Annual Number of Respondents: 12.

Estimated Time per Respondent: 2 hours.

Annual Burden Hours: 24 hours.

Frequency of Reporting of Use: As required.

Government Expenses:

Reviewing time per year: 2 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $1020.00 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: $1224.00.

Bassam Doughman,

IT Specialist.

[FR Doc. 2022–03930 Filed 2–23–22; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than March 10, 2022.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *The David C. Neuhaus Bank Stock Revocable Trust, Fairfax, Iowa; Laurie Neuhaus, as trustee, Amana, Iowa; Patrick E. Slater, Lois E. Slater and John C. Slater, all of Cedar Rapids, Iowa; and David J. Slater, Lakewood, Colorado;* to become members of the Neuhaus Family Control Group, a group acting in concert, to retain voting shares of Vanderbilt Holding Company, Inc., and thereby indirectly retain voting shares of Fairfax State Savings Bank, both of Fairfax, Iowa. Additionally, Patrick E. Slater to acquire additional voting shares of Vanderbilt Holding Company, Inc., and thereby indirectly acquire voting shares of Fairfax State Savings Bank.

2. *Jeffrey Ilstrup, Onalaska, Wisconsin, and Richard Davig, Viroqua, Wisconsin;* to become members of the Ilstrup Family Control Group, a group acting in concert, to acquire additional voting shares of Firsnabanco, Inc., and thereby indirectly acquire voting shares of Citizens First Bank, both of Viroqua, Wisconsin.

B. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The Graydon J. Kincaid, Jr. 2020 Trust, dated December 1, 2020, Graydon J. Kincaid, Jr., as trustee, both of Mission Hills, Kansas;* to acquire voting shares of Northeast Kansas Bancshares, Inc., and thereby indirectly acquire voting shares of Kendall Bank, both of Overland Park, Kansas.

2. *Ryan C. Sullivan, Mission Hills, Kansas, and Bryan J. Adams, Fairway, Kansas;* to form the Sullivan/Adams control group, a group acting in concert, to retain voting shares of Northeast Kansas Bancshares, Inc., and thereby indirectly retain voting shares of Kendall Bank, both of Overland Park, Kansas.

Board of Governors of the Federal Reserve System, February 18, 2022.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2022–03952 Filed 2–23–22; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than March 25, 2022.

A. Federal Reserve Bank of San Francisco (Sebastian Astrada, Director, Applications) 101 Market Street, San Francisco, California 94105–1579:

1. *Endeavor Bancorp, San Diego, California;* to become a bank holding company by acquiring Endeavor Bank, San Diego, California.

Board of Governors of the Federal Reserve System, February 18, 2022.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2022–03948 Filed 2–23–22; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (FTC).

ACTION: Notice and request for comment.

SUMMARY: The FTC requests that the Office of Management and Budget (OMB) extend for three years the current Paperwork Reduction Act (PRA) clearance for information collection requirements contained in the agency's shared enforcement with the Consumer Financial Protection Bureau (CFPB) of subpart N of the CFPB's Regulation V (Rule). That clearance expires on February 28, 2022.

DATES: Comments must be received by March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. The *reginfo.gov* web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

FOR FURTHER INFORMATION CONTACT: Ryan Mehm, Attorney, Bureau of Consumer Protection, (202) 326–2918, Federal Trade Commission, 600 Pennsylvania Ave. NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Title: Regulation V, Subpart N (12 CFR 1022.130–1022.138).

OMB Control Number: 3084–0128.

Type of Review: Extension of a currently approved collection.

Annual Burden: After halving the updated estimates to split the PRA burden with the CFPB regarding the Rule, the FTC's burden totals are 192,722 hours, $4,072,801 in associated labor costs, and $6,227,100 in non-labor/capital costs.

Abstract: The FTC shares enforcement authority with the CFPB for subpart N of Regulation V. Subpart N requires nationwide consumer reporting agencies and nationwide consumer specialty reporting agencies to provide to consumers, upon request, one free file disclosure within any 12-month period. Generally, it requires the nationwide consumer reporting agencies, as defined in Section 603(p) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681a(p), to create and operate a centralized source that provides consumers with the ability to request their free annual file disclosures from each of the nationwide consumer reporting agencies through a centralized internet website, toll-free telephone number, and postal address. Subpart N also requires the nationwide consumer reporting agencies to establish a standardized form for internet and mail requests for annual file disclosures, and provides a model standardized form that may be used to comply with that requirement. It additionally requires nationwide specialty consumer reporting agencies, as defined in Section 603(w) of the FCRA, 15 U.S.C. 1681a(w), to establish a streamlined process for consumers to request annual file disclosures. This streamlined process must include a toll-free telephone number for consumers to make such requests.

On November 16, 2021, the FTC sought public comment on the information collection requirements associated with the Rule. 86 FR 63387. The Commission received no germane comments. Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rules.

Your comment—including your name and your state—will be placed on the public record of this proceeding. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Josephine Liu,

Assistant General Counsel for Legal Counsel.

[FR Doc. 2022–03914 Filed 2–23–22; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Lead Exposure and Prevention Advisory Committee (LEPAC); Notice of Recharter

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of recharter.

SUMMARY: This gives notice under the Federal Advisory Committee Act of October 6, 1972, that the Lead Exposure and Prevention Advisory Committee (LEPAC), Centers for Disease Control and Prevention, Department of Health and Human Services, has been renewed for a 2-year period through January 17, 2024.

FOR FURTHER INFORMATION CONTACT: Paul Allwood, Ph.D., MPH, RS, Designated Federal Officer, Branch Chief, National Center for Environmental Health, CDC, 4770 Buford Highway NE, Atlanta, Georgia 30341, telephone (770) 488–6774; *PAllwood@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–03865 Filed 2–23–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–005, Research Grants for Preventing Violence and Violence Related Injury (R01); Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–009, Research Grants for Preventing Violence and Violence Related Injury (R01), May 10–11, 2022, 8:30 a.m., EDT–5:30 p.m., EDT, Web Conference, in the original FRN. The meeting was published in the **Federal Register** on February 14, 2022, Volume 87, Number 30, page(s) 8252.

The meeting is being amended to reflect the correct Notice of Funding Opportunity (NOFO) number and should read as follows: CE22–005, Research Grants for Preventing Violence and Violence Related Injury (R01).

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Aisha L. Wilkes, M.P.H., Scientific Review Official, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341, Telephone (404) 639–6473, *AWilkes@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–03871 Filed 2–23–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Center for Preparedness and Response, (BSC, CPR); Meeting

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Board of Scientific Counselors, Center for Preparedness and Response, (BSC, CPR). This is a virtual meeting that is open to the public, limited only by the number of internet conference accesses available, which is 500. Time will be available for public comment. Pre-registration is required by accessing the link in the addresses section.

DATES: The meeting will be held on March 24, 2022, from 1:00 p.m. to 3:00 p.m., EDT.

ADDRESSES: Zoom Virtual Meeting. If you wish to attend the virtual meeting, please pre-register by accessing the link at: *https://cdc.zoomgov.com/webinar/register/WN_M20Tm8MUTbih-Uhvg0BcSg.* Instructions to access the Zoom virtual meeting will be provided in the link following registration.

FOR FURTHER INFORMATION CONTACT: Dometa Ouisley, Office of Science and Public Health Practice, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop–H21–6, Atlanta, Georgia 30329–4027, Telephone: (404) 639–7450; Facsimile: (678) 669–1667; Email: *DOuisley@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The Board is charged with providing advice and guidance to the Secretary, Department of Health and Human Services (HHS), the Assistant Secretary for Health (ASH), the Director, Centers for Disease Control and Prevention (CDC), and the Director, Center for Preparedness and Response (CPR), concerning strategies and goals for the programs and research within CPR, monitoring the overall strategic direction and focus of the CPR Divisions and Offices, and administration and oversight of peer review for CPR scientific programs. For additional information about the Board, please visit: *https://www.cdc.gov/cpr/bsc/index.htm.*

Matters To Be Considered: The agenda will include: (1) BSC CPR Polio Containment Workgroup (PCWG) Update; and (2) Strategic Capacity Building and Innovation Program Review Working Group Update. Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–03869 Filed 2–23–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—RFA–TS–22–001: Identify and Evaluate Potential Risk Factors for Amyotrophic Lateral Sclerosis (ALS).

Date: June 17, 2022

Time: 8:30 a.m.–5:30 p.m., EDT.

Place: Videoconference.

Agenda: To review and evaluate grant applications.

FOR FURTHER INFORMATION CONTACT: Mikel Walters, Ph.D., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341, Telephone (404)639–0913, *MWalters@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–03870 Filed 2–23–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10398 #57]

Medicaid and Children's Health Insurance Program (CHIP) Generic Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: On May 28, 2010, the Office of Management and Budget (OMB) issued Paperwork Reduction Act (PRA) guidance related to the ''generic'' clearance process. Generally, this is an expedited process by which agencies may obtain OMB's approval of

collection of information requests that are ''usually voluntary, low-burden, and uncontroversial collections,'' do not raise any substantive or policy issues, and do not require policy or methodological review. The process requires the submission of an overarching plan that defines the scope of the individual collections that would fall under its umbrella. On October 23, 2011, OMB approved our initial request to use the generic clearance process under control number 0938–1148 (CMS–10398). It was last approved on April 26, 2021, via the standard PRA process which included the publication of 60- and 30-day **Federal Register** notices. The scope of the April 2021 umbrella accounts for Medicaid and CHIP State plan amendments, waivers, demonstrations, and reporting. This **Federal Register** notice seeks public comment on one or more of our collection of information requests that we believe are generic and fall within the scope of the umbrella. Interested persons are invited to submit comments regarding our burden estimates or any other aspect of this collection of information, including: the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by March 10, 2022.

ADDRESSES: When commenting, please reference the applicable form number (see below) and the OMB control number (0938–1148). To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: CMS–10398 (#74)/OMB control number: 0938–1148, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may access CMS' website at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Following is a summary of the use and burden associated with the subject information collection(s). More detailed information can be found in the collection's supporting statement and associated materials (see **ADDRESSES**).

Generic Information Collection

1. *Title of Information Collection:* Medicaid Section 1115 Substance Use Disorder (SUD) Demonstration: Monitoring Reports Documents and Templates; *Type of Information Collection Request:* Revision of a currently approved collection; *Use:* On November 1, 2017, CMS released a letter #17–003 to all state Medicaid Directors announcing new directions on how CMS would like to work with states on section 1115(a) demonstrations to improve access to and quality of treatment for Medicaid beneficiaries as part of a Department-wide effort to combat the ongoing opioid crisis. The letter also announced that CMS is now offering a more flexible, streamlined approach to accelerate states' ability to respond to the national opioid crisis while enhancing states' monitoring and reporting of the impact of any changes implemented through these demonstrations.

Medicaid Section 1115 demonstration monitoring and evaluation Special Terms and Conditions (STC), and the letter #17–003, make clear that CMS remains committed to ensuring state accountability for the health and well-being of Medicaid enrollees and that monitoring and evaluation are important for understanding the outcomes and impacts of approaches to Medicaid SUD demonstrations. For this purpose, CMS is undertaking efforts to help states monitor the elements of these demonstrations, while giving them the flexibility to adapt to changing conditions in their states. States with approved SUD demonstrations are required to develop implementation and monitoring plans, including monitoring metrics, a monitoring protocol, and regular monitoring reports describing their implementation progress.

In addition, the STCs for these section 1115 demonstrations address that states are required to submit in their regular monitoring reports, information on milestones and performance measures that they elected to represent key indicators of progress toward meeting the goals for the demonstrations.

Furthermore, to improve the quality and efficiency of the reporting requirements for SUD demonstrations, CMS in conjunction with state advisory groups developed a set of standardized monitoring tools for states to use for their regular reporting, including:

- The Medicaid section 1115 SUD demonstration monitoring protocol template (this is a one-time submission);
- The Medicaid section 1115 SUD demonstration monitoring protocol workbook (this is a one-time submission);
- The Medicaid section 1115 SUD demonstration monitoring report template, and;
- The Medicaid Section 1115 SUD demonstration monitoring report workbook.

As specified in official 1115 policy communications to states:

In accordance with 42 CFR 431.428 states must submit all post-approval deliverables as stipulated by CMS and within the timeframes outlined within the STCs for the specific Medicaid 1115 State Demonstration.

The State Medicaid Director Letter, #17–003, entitled, *Strategies Addressing the Opioid Epidemic,* provides a framework for SUD demonstrations under Medicaid Section 1115 Authority. This letter indicates that a state's application should confirm its commitment to assuring the necessary resources to support robust monitoring protocol and evaluation, and that the state will provide an implementation plan subject to CMS approval. The letter further states that information about the specific measures and reporting will be detailed in a monitoring protocol agreed upon by CMS and the state after approval of the demonstration which will demonstrate progress toward meeting the goals for this demonstration initiative.

In addition, the STCs for the Medicaid section 1115 SUD demonstrations require that approved states submit an SUD implementation plan subject to CMS approval, and an SUD monitoring protocol to be developed in cooperation with CMS and which is subject to CMS approval. The SUD monitoring protocol, reporting templates, and associated monitoring metrics flow down from the OMB-approved SUD implementation plan, which aligns with the goals and objectives of the demonstration as expressed in SMDL #17–003.

The STCs also require approved states to submit three quarterly and one annual monitoring reports consistent with the elements provided in 42 CFR

431.428 and in accordance with a framework to be provided by CMS. The STCs also provide that the monitoring framework be subject to change as monitoring systems are developed and evolve, and that states are required to report in a structured manner that supports federal tracking and analysis.

In this 2022 information collection request, we have revised the following monitoring tools:

- Monitoring protocol tools:
  - Monitoring protocol workbook (updated to Version 6.0)
  - Monitoring protocol template (updated to Version 4.0)
- Monitoring report tools:
  - Monitoring report template (updated to Version 4.0)
  - Monitoring report workbook (updated to Version 6.0)

This 2022 release incorporates updated guidance on reporting metrics, narrative information, and other clarifications. This release also reflects modifications to align with the Medicaid Section 1115 Substance Use Disorder Demonstrations: Technical Specifications for Monitoring Metrics Manual Version 4.0 (released September 2021).

In addition, this release incorporates updated functionality in the Performance Metrics Database & Analytics (PMDA) system aimed to automate aspects of reporting and customize tools to ease state burden. Updated functionality includes:

- Auto-population of certain fields within the monitoring report tools in alignment with the state's CMS-approved monitoring protocol.
- Reporting flagged items early in the process to reduce resubmission and allow CMS to engage with the state faster and on a more detailed level.
- Ensuring the latest version of the monitoring tools are utilized by sending an email notification to all designated demonstration contacts when customized monitoring report tools are available.

Form Number: CMS–10398 (#57) (OMB control number: 0938–1148); *Frequency:* Once, yearly, and quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 35; *Total Annual Responses:* 596; *Total Annual Hours:* 6,394. For policy questions regarding this collection contact: Danielle Daly at 410–786–0897.

Dated: February 18, 2022.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2022–03936 Filed 2–23–22; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0013]

Agency Information Collection Activities; Proposed Collection; Comment Request; Sanitary Transportation of Human and Animal Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements associated with the sanitary transportation of human and animal food.

DATES: Submit either electronic or written comments on the collection of information by April 25, 2022.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 25, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 25, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–0013 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Sanitary Transportation of Human and Animal Food.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Sanitary Transportation of Human and Animal Food—21 CFR Part 1, Subpart O

OMB Control Number 0910–0773—Extension

This information collection supports FDA regulations regarding the sanitary transportation of human and animal food. The regulations are intended to focus on preventing food safety problems throughout the food chain and were issued under the Sanitary Food Transportation Act of 2005 (2005 SFTA), and the FDA Food Safety Modernization Act, enacted in 2011. The 2005 SFTA amended the Federal Food, Drug, and Cosmetic Act (FD&C Act), in part, by creating section 416 (21 U.S.C. 350e), which directs us to issue regulations to require shippers, carriers by motor vehicle or rail vehicle, receivers, and other persons engaged in the transportation of food to use prescribed sanitary transportation practices to ensure that food is not transported under conditions that may render the food adulterated. Section 416 also directs that we prescribe appropriate human and animal food transportation practice requirements relating to: (1) Sanitation; (2) packaging, isolation, and other protective measures; (3) limitations on the use of vehicles; (4) information to be disclosed to carriers and to manufacturers; and (5) recordkeeping.

In addition, the 2005 SFTA created section 402(i) of the FD&C Act (21 U.S.C. 342(i)), which provides that food that is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with the regulations issued under section 416 is adulterated and section 301(hh) of the FD&C Act (21 U.S.C. 331(hh)), which prohibits the failure by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food to comply with the regulations issued under section 416.

The 2005 SFTA also amended section 703 of the FD&C Act (21 U.S.C. 373) by providing that a shipper, carrier by motor vehicle or rail vehicle, receiver, or other person subject to section 416 shall, on request of an officer or employee designated by FDA, permit the officer or employee, at reasonable times, to have access to and to copy all records that are required to be kept under the regulations issued under section 416.

Accordingly, we issued regulations in 21 CFR part 1, subpart O (21 CFR 1.900 through 1.934) that establish requirements for the sanitary transportation of human and animal food, as well as prescribe procedures for respondents who wish to request a waiver for any requirement. For additional information regarding Agency implementation of the SFTA, visit our website at *https://www.fda.gov/food/guidance-documents-regulatory-information-topic-food-and-dietary-supplements/sanitation-transportation-guidance-documents-regulatory-information.*

We estimate the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
1.912; Record retention	1,502,032	1	1,502,032	0.083 (5 minutes)	124,669

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We estimate an annual recordkeeping burden of 124,669, which assumes 1,502,032 workers will spend an average of 5 minutes on activities related to the record retention requirements under 21 CFR 1.912. We expect these activities will likely include documenting procedures and training, as well as sanitary transportation operations and specification requirements.

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
1.914; Waiver petitions	2	1	2	24	48

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We estimate one waiver petition from each of two firms will be submitted and respondents will spend 24 hours to prepare and submit the petition to FDA.

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN[1]

21 CFR section; activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
1.908; Disclosure of sanitary specifications; operating temperature conditions.	226	1	226	0.5833 (~35 minutes)	132

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Finally, we estimate an annual third-party disclosure burden of 132 hours, assuming each of 226 firms will spend an average of 35 minutes, annually, disclosing written records as required under 21 CFR 1.908.

Based on an evaluation of the information collection, we have made no adjustments to our burden estimate.

Dated: February 16, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–03916 Filed 2–23–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2252]

Final Assessment of the Program for Enhanced Review Transparency and Communication in the Biosimilar User Fee Act; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the following virtual public meeting entitled ''Final Assessment of the Program for Enhanced Review Transparency and Communication in the Biosimilar User Fee Act (BsUFA)'' (the Program) and an opportunity for public comment. The topics to be discussed are the final assessment and public stakeholder views of the Program.

DATES: The public meeting will be held on March 22, 2022, from 9:30 a.m. to 12:30 p.m. Eastern Time and will be held by webcast only. Submit either electronic or written comments on this public meeting by May 23, 2022. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: Registration to attend the meeting and other information can be found at *https://www.eventbrite.com/e/public-meeting-on-the-final-assessment-of-the-bsufa-ii-program-tickets-229459628927.*

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before May 23, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 23, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–2252 for ''Final Assessment of the Program for Enhanced Review Transparency and Communication in the Biosimilar User Fee Act (BsUFA); Public Meeting; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Kimberly Taylor, Food and Drug Administration, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1152, Silver Spring, MD 20993, 240–402–5193, *Kimberly.taylor@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

BsUFA was originally enacted in 2012 as the Biosimilar User Fee Act under the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144) for a period of 5 years. In 2017, BsUFA was renewed for 5 more years under the FDA Reauthorization Act of 2017 (FDARA) (BsUFA II) (Pub. L. 115–52, Title IV)). BsUFA was intended to provide additional revenues so that FDA can hire staff, improve systems, and continue a well-managed biosimilar biological product review process to make biosimilar biological product therapies available to patients sooner. BsUFA II was authorized to continue the collection of user fees by FDA to facilitate and expedite the process for the review of biosimilar biological products in the United States.

Under BsUFA II, FDA committed to apply a new review model to original biosimilar biologics license application (BLA) reviews. That review model is identified in section II.B. of the BsUFA II Commitment Letter as the Program for Enhanced Review Transparency and Communication for Original 351(k) BLAs. The Program provides opportunities for increased communication between FDA and applicants, including mid-cycle and late-cycle meetings. To accommodate the increased interaction during regulatory review, FDA's review clock begins after the 60-day administrative filing review period for applications reviewed under the Program. The goal of the Program is to promote the efficiency and effectiveness of the first-cycle review process and minimize the number of review cycles necessary for approval, ensuring that patients have timely access to safe, effective, and high-quality biosimilar and interchangeable biological products.

An independent evaluator is assessing the Program to understand its effect on the review of original 351(k) BLAs. An interim assessment was published December 3, 2020, and can be accessed at *https://www.fda.gov/media/144130/download.* The BsUFA II performance commitments also call for a final assessment of the Program to be published by June 30, 2022, for public comment. The final assessment can be accessed at *https://www.fda.gov/industry/biosimilar-user-fee-amendments/bsufa-ii-assessment-program-enhanced-review-transparency-and-communication-biosimilar-user-fee-act.* A public meeting will be held on March 22, 2022, where the final assessment will be discussed, and public stakeholders may present their views on the Program.

Additional information concerning BsUFA—including the text of the law, the ''Biosimilar Biological Product Reauthorization Performance Goals and Procedures Fiscal Years 2018 through 2022'' (the BsUFA II Commitment Letter), ''Biosimilar Authorization Performance Goals and Procedures Fiscal Years 2013 through 2017'' (the BsUFA Commitment Letter), key **Federal Register** documents, BsUFA-related guidances, BsUFA user fee rates, performance reports, and financial reports—may be found at *https://www.fda.gov/industry/fda-user-fee-programs/biosimilar-user-fee-amendments.*

II. Topics for Discussion at the Public Meeting

FDA and an independent contractor will discuss the findings of the final assessment, including anonymized and aggregated feedback from biosimilar BLA applicants and FDA review teams resulting from independent contractor interviews. FDA will discuss any issues identified, including any proposed plans to improve the likelihood of the Program's success. A panel of external stakeholders will also provide their perspectives.

III. Participating in the Public Meeting

Registration: Registration is optional and not required to attend this virtual public meeting. However, registering will allow FDA to provide you with email updates if any meeting details change. If you wish to register, you can do so at *https://www.eventbrite.com/e/public-meeting-on-the-final-assessment-of-the-bsufa-ii-program-tickets-229459628927.*

Opportunity for Verbal Public Comment: Those who register online will receive a confirmation email that includes a link to a request form to make verbal public comment at the meeting. If you wish to speak during the public comment session, follow the instructions in the notification and identify which topic(s) you wish to address. We will do our best to accommodate requests to make public comments. Individuals and organizations with common interests are urged to consolidate or coordinate their comments and request time jointly. All requests to make a public comment during the meeting must be received by March 10, 2022, 11:59 p.m. Eastern Time. Depending on the number of requests, we will determine the amount of time allotted to each commenter, the approximate time each comment is to begin, and will select and notify participants by March 18, 2022. No commercial or promotional material will be permitted to be presented at the public meeting.

Streaming Webcast of the Public Meeting: The Zoom Webinar ID for this public meeting is 161 769 1719. The webcast link for this public meeting can be found here: *https://fda.zoomgov.com/j/1617691719?pwd=dy9yRTVqdEw1dVEzTUNqelFEa3Vpdz09.* This link should allow you to enter the webinar directly. If Zoom asks for a passcode, please use the passcode f7DLM=, which is case-sensitive.

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the meeting recording will also be available on the internet at *https://www.fda.gov/drugs/news-events-human-drugs/public-meeting-final-assessment-program-enhanced-review-transparency-and-communication-biosimilar.*

Dated: February 18, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–03926 Filed 2–23–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–D–1311]

Nonclinical Considerations for Mitigating Nonhuman Primate Supply Constraints Arising From the COVID–19 Pandemic; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing the availability of a final guidance for industry entitled ''Nonclinical Considerations for Mitigating Nonhuman Primate Supply Constraints Arising from the COVID–19 Pandemic.'' The COVID–19 pandemic has resulted in a significant reduction in the supply of nonhuman primates (NHPs) available for conducting toxicology studies for new pharmaceuticals. This has the potential to significantly delay the development of new medications for the treatment of diseases currently without effective treatment options. This guidance provides FDA's recommendations to industry to help mitigate the NHP supply issue by reducing the demand for NHPs during the COVID–19 pandemic. Given the public health emergency presented by COVID–19, this guidance document is being implemented without prior public comment because FDA has determined that prior public participation is not feasible or appropriate, but it remains subject to comment in accordance with the Agency's good guidance practices.

DATES: The announcement of the guidance is published in the **Federal Register** on February 24, 2022.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–D–1311 for ''Nonclinical Considerations for Mitigating Nonhuman Primate Supply Constraints Arising from the COVID–19 Pandemic.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Ronald Wange, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 3342, Silver Spring, MD 20993–0002, 301–796–1304; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a final guidance for industry entitled ''Nonclinical Considerations for Mitigating Nonhuman Primate Supply Constraints Arising from the COVID–19 Pandemic.''

The COVID–19 pandemic has caused a marked reduction in the supply of NHPs available for conducting nonclinical toxicity assessments. Before the pandemic, China was the largest supplier of NHPs used in pharmaceutical development, accounting for 60 percent of NHPs imported to the United States.[1] Early in the pandemic, China implemented a ban on the trade of wild animals—including NHPs—in an effort to potentially curb the spread of SARS–CoV–2. This ban remains in effect. In conjunction with this reduction in supply, there has been a substantial increase in the demand for NHPs for the testing of experimental COVID–19 treatments and vaccines.[2]

This reduction in supply and prioritization for COVID–19-related studies have severely restricted the availability of NHPs for other pharmaceutical development programs, resulting in a disruption in supply that has the potential to significantly delay the development of new medications for the treatment of diseases currently without effective treatment options. While the disruption affects the NHP supply generally, there is a particularly acute shortage of sexually mature NHPs that are often the only pharmacologically relevant species with which to assess developmental and reproductive toxicity endpoints for biotherapeutic proteins (biological products).

This guidance provides recommendations regarding the use of NHPs in development programs for small molecule drugs as well as for biological products, covering both general toxicity studies and developmental and reproductive toxicity (DART) studies. The guidance provides FDA's recommendations for sponsors to use alternative nonrodent species, whenever possible, in general toxicology studies and, in general, to not use NHPs for DART assessment of small molecule drugs. For DART studies of biological products, the guidance provides FDA's recommendation that sponsors fully utilize non-NHP approaches to assess DART. These approaches include, when scientifically appropriate, the use of a weight-of-evidence approach to risk assessment, the use of species-specific surrogate proteins in rodents, and the use of rodents genetically modified to (1) respond to the clinical candidate or (2) evaluate the effects of altered activity of the target of the biological product. In instances with no scientifically appropriate alternatives to the NHP, the sponsor may be able to reduce the number of NHPs used per study by reducing the number of treatment groups in the study. The guidance also addresses the potential for delaying the conduct of DART studies to the postmarketing setting. Taken together, these recommendations are expected to help mitigate the constrained supply of NHPs until such time as the NHP supply recovers sufficiently from the effect of the COVID–19 pandemic.

In light of the public health emergency related to COVID–19 declared by the Secretary of Health and Human Services (HHS), pursuant to section 319(a)(2) of the Public Health Service Act (42 U.S.C. 247d(a)(2)), FDA has determined that prior public participation for this guidance is not feasible or appropriate and is issuing this guidance without prior public comment (see section 701(h)(1)(C)(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371(h)(1)(C)(i) and 21 CFR 10.115(g)(2)). This guidance document is being implemented immediately, but it remains subject to comment in accordance with the Agency's good guidance practice statute and regulation.

This guidance is intended to remain in effect for the duration of the public health emergency related to COVID–19 declared by the Secretary of HHS, including any renewals.[3] However, the recommendations and processes described in the guidance are expected to help mitigate the COVID–19 pandemic-related NHP supply constraints affecting pharmaceutical development that are expected to persist beyond the termination of the COVID–19 public health emergency (*e.g.,* time required to rebuild breeding stocks and for NHPs to reach sexual maturity) and reflect the Agency's current thinking on this issue. Therefore, within 60 days following the termination of the public health emergency, FDA intends to revise and replace this guidance with any appropriate changes based on comments received on this guidance and the Agency's experience with implementation.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Nonclinical Considerations for Mitigating Nonhuman Primate Supply Constraints Arising from the COVID–19 Pandemic.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; and the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://*

[1] See ''Rapid Response by Laboratory Animal Research Institutions During the COVID–19 Pandemic: Lessons Learned: Proceedings of a Workshop—in Brief''; available at *https://www.nap.edu/catalog/26189/rapid-response-by-laboratory-animal-research-institutions-during-the-covid-19-pandemic-lessons-learned.*

[2] FDA supports the principles of the 3Rs, to reduce, refine, and replace animal use in testing when feasible. We encourage sponsors to consult with us if they wish to use a nonanimal testing method they believe is suitable, adequate, validated, and feasible. We will consider if such an alternative method is adequate to meet the regulatory need.

[3] See *https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.*

www.fda.gov/regulatory-information/search-fda-guidance-documents, https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-related-guidance-documents-industry-fda-staff-and-other-stakeholders, or *https://www.regulations.gov.*

Dated: February 16, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–03915 Filed 2–23–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors of the NIH Clinical Center.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the CLINICAL CENTER, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors of the NIH Clinical Center.

Date: March 28, 2022.

Time: 10:00 a.m. to 4:45 p.m.

Agenda: To review and evaluate department of Perioperative Medicine Pain and Palliative Care Service and Interviews.

Place: Clinical Center, National Institutes of Health, 10 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ronald Neumann, MD, Senior Investigation, Clinical Center, National Institutes of Health, 10 Center Drive, Bethesda, MD 20892, 301–496–6455, *rneumann@cc.nih.gov.*

Name of Committee: Board of Scientific Counselors of the NIH Clinical Center.

Date: March 29, 2022.

Time: 10:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate department of Perioperative Medicine Pain and Palliative Care Service and Interviews.

Place: Clinical Center, National Institutes of Health, 10 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ronald Neumann, MD, Senior Investigation, Clinical Center, National Institutes of Health, 10 Center Drive, Bethesda, MD 20892, 301–496–6455, *rneumann@cc.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: February 18, 2022.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–03946 Filed 2–23–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel. The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Career Development (Ks) and Conference support (R13) Review.

Date: March 17, 2022.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Songtao Liu, MD, Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 920, Bethesda, MD 20892, (301) 827–3025, *songtao.liu@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, HHS)

Dated: February 17, 2022.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–03888 Filed 2–23–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2022–0002; Internal Agency Docket No. FEMA–B–2216]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Connecticut: Litchfield.	Town of Goshen (21–01–1073P).	The Honorable Todd M. Carusillo, First Selectman, Town of Goshen Board of Selectmen, 42A North Street, Goshen CT 06756.	Town Hall, 42A North Street, Goshen, CT 06756.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2022	090177
Florida:						
Broward	City of Deerfield Beach (21–04–3153P).	Mr. Dave Santucci, Manager, City of Deerfield Beach, 150 Northeast 2nd Avenue, Deerfield Beach, FL 33442.	Environmental Services Department, 200 Goolsby Boulevard, Deerfield Beach, FL 33442.	*https://msc.fema.gov/portal/advanceSearch.*	May 16, 2022	125101
Broward	City of Tamarac (21–04–2763P).	The Honorable Michelle J. Gomez, Mayor, City of Tamarac, 7525 Northwest 88th Avenue, Tamarac, FL 33321.	Building Department, 7525 Northwest 88th Avenue, Tamarac, FL 33321.	*https://msc.fema.gov/portal/advanceSearch.*	May 23, 2022	120058
Lake	City of Minneola (21–04–5355P).	The Honorable Pat Kelley, Mayor, City of Minneola, 800 North U.S. Highway 27, Minneola, FL 34755.	City Hall, 800 North U.S. Highway 27, Minneola, FL 34755.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2022	120412
Lee	City of Bonita Springs (21–04–4847P).	The Honorable Rick Steinmeyer, Mayor, City of Bonita Springs, 9101 Bonita Beach Road, Bonita Springs, FL 34135.	Community Development Department, 9220 Bonita Beach Road, Suite 111, Bonita Springs, FL 34135.	*https://msc.fema.gov/poral/advanceSearch.*	May 23, 2022	120680
Monroe	Unincorporated areas of Monroe County (21–04–4119P).	The Honorable Michelle Coldiron, Commissioner, Monroe County Board of Commissioners, 25 Ships Way, Big Pine Key, FL 33043.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2022	125129
Monroe	Unincorporated areas of Monroe County (21–04–5348P).	The Honorable Michelle Coldiron, Commissioner, Monroe County Board of Commissioners, 25 Ships Way, Big Pine Key, FL 33043.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	*https://msc.fema.gov/portal/advanceSearch.*	May 23, 2022	125129

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Pinellas	Unincorporated areas of Pinellas County (21–04–4469P).	The Honorable David Eggers, Chairman, Pinellas County Board of Commissioners, 315 Court Street, Clearwater, FL 33756.	Pinellas County Building Department, 22211 U.S. Highway 19 North, Building 1, 315 Court Street, Clearwater, FL 33756.	*https://msc.fema.gov/portal/advanceSearch*.	May 26, 2022	125139
Sarasota	City of Sarasota (21–04–4914P).	The Honorable Erik Arroyo, Mayor, City of Sarasota, 1565 1st Street, Room 101, Sarasota, FL 34236.	Development Services Department, 1565 1st Street, Sarasota, FL 34236.	*https://msc.fema.gov/portal/advanceSearch*.	May 26, 2022	125150
Sarasota	Unincorporated areas of Sarasota County (21–04–4979P).	The Honorable Alan Maio, Chairman, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.	Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.	*https://msc.fema.gov/portal/advanceSearch*.	May 23, 2022	125144
Sumter	City of Wildwood (21–04–4694P).	The Honorable Ed Wolf, Mayor, City of Wildwood, 100 North Main Street, Wildwood, FL 34785.	City Hall, 100 North Main Street, Wildwood, FL 34785.	*https://msc.fema.gov/portal/advanceSearch*.	May 23, 2022	120299
Sumter	Unincorporated areas of Sumter County (21–04–4694P).	The Honorable Gary Breeden, Chairman, Sumter County Board of Commissioners, 7375 Powell Road, Wildwood, FL 34785.	Sumter County Development Services Department, 7375 Powell Road, Wildwood, FL 34785.	*https://msc.fema.gov/portal/advanceSearch*.	May 23, 2022	120296
Georgia:						
Effingham	Unincorporated areas of Effingham County (20–04–5821P).	The Honorable Wesley Corbitt, Chairman at Large, Effingham County Board of Commissioners, 804 South Laurel Street, Springfield, GA 31329.	Effingham County Development Services Department, 804 South Laurel Street, Springfield, GA 31329.	*https://msc.fema.gov/portal/advanceSearch*.	Apr. 28, 2022	130076
Muscogee	Columbus Consolidated Government (21–04–2724P).	The Honorable B.H. "Skip" Henderson III, Mayor, Columbus Consolidated Government, 100 10th Street, Columbus, GA 31901.	Planning Department, 420 10th Street, 2nd Floor, Columbus, GA 31901.	*https://msc.fema.gov/portal/advanceSearch*.	May 6, 2022	135158
Kentucky: Hardin	City of Elizabethtown (21–04–1017P).	The Honorable Jeffrey H. Gregory, Mayor, City of Elizabethtown, 200 West Dixie Avenue, Elizabethtown, KY 42702.	Stormwater Management Department, 200 West Dixie Avenue, Elizabethtown, KY 42702.	*https://msc.fema.gov/portal/advanceSearch*.	May 25, 2022	210095
Maine: York	Town of York (21–01–1032P).	The Honorable Todd A. Frederick, Chairman, Town of York Board of Selectmen, 186 York Street, York, ME 03909.	Building Department, 186 York Street, York, ME 03909.	*https://msc.fema.gov/portal/advanceSearch*.	Apr. 28, 2022	230159
North Carolina:						
Davie	Unincorporated areas of Davie County (21–04–2539P).	The Honorable Terry Renegar, Chairman, Davie County, Board of Commissioners, 123 South Main Street, Mocksville, NC 27028.	Davie County Development Services Department, 172 Clement Street, Mocksville, NC 27028.	*https://msc.fema.gov/portal/advanceSearch*.	Apr. 15, 2022	370308
Mecklenburg	Town of Davidson (21–04–5219P).	The Honorable Rusty Knox, Mayor, Town of Davidson, P.O. Box 579, Davidson, NC 20836.	Planning Department, 216 South Main Street, Davidson, NC 20836.	*https://msc.fema.gov/portal/advanceSearch*.	Apr. 27, 2022	370503
Mecklenburg	Unincorporated areas of Mecklenburg County (21–04–5219P).	Ms. Dena R. Diorio, Mecklenburg County Manager, 600 East 4th Street, Charlotte, NC 28202.	Mecklenburg County Storm Water Services Division, 2145 Suttle Avenue, Charlotte, NC 28202.	*https://msc.fema.gov/portal/advanceSearch*.	Apr. 27, 2022	370158
Texas:						
Collin	City of Wylie (21–06–2443P).	The Honorable Matthew Porter, Mayor, City of Wylie, 300 Country Club Road, Building 100, Wylie, TX 75098.	City Hall, 300 Country Club Road, Building 100, Wylie, TX 75098.	*https://msc.fema.gov/portal/advanceSearch*.	May 9, 2022	480759
Collin	Unincorporated areas of Collin County (21–06–2443P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 22, McKinney, TX 75071.	*https://msc.fema.gov/portal/advanceSearch*.	May 9, 2022	480130

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Denton	Town of Northlake (21–06–1777P).	The Honorable David Rettig, Mayor, Town of Northlake, 1500 Commons Circle, Suite 300, Northlake, TX 76226.	Town Hall, 1500 Commons Circle, Suite 300, Northlake, TX 76226.	*https://msc.fema.gov/portal/advanceSearch.*	Jun. 6, 2022	480782
Johnson	City of Burleson (21–06–2590P).	The Honorable Chris Fletcher, Mayor, City of Burleson, 141 West Renfro Street, Burleson, TX 76028.	City Hall, 141 West Renfro Street, Burleson, TX 76028.	*https://msc.fema.gov/portal/advanceSearch.*	Jun. 2, 2022	485459

[FR Doc. 2022–03856 Filed 2–23–22; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

FWS–R1–ES–2021–N202; FXES11130100000–223–FF01E00000]

Endangered and Threatened Wildlife and Plants; Draft Recovery Plan for 50 Hawaiian Archipelago Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for review and public comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of a draft recovery plan for 50 Hawaiian archipelago species. We request review and comment from the public and local, State, Tribal, and Federal agencies.

DATES: To ensure consideration, comments on the draft recovery plan must be received on or before April 25, 2022. However, we will accept information about any species at any time.

ADDRESSES: *Document availability:* Obtain the recovery plan by any of the following methods.

- *Internet: http://www.fws.gov/endangered/species/recovery-plans.html* or *http://www.fws.gov/pacific/ecoservices/endangered/recovery/plans.html.*
- *U.S. mail:* Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3122, Honolulu, HI 96850.
- *Telephone:* (808) 792–9400.

Comment submission: You may submit written comments and materials by one of the following methods:

- *U.S. mail:* Gregory Koob, Deputy Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, at the above U.S. mail address.
- *Fax:* 808–792–9581.
- *Email: gregory_koob@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Gregory Koob, Deputy Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, at the above U.S. mail address, or via telephone at 808–792–9400. If you use a telecommunications device for the deaf, call the Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft recovery plan for 50 Hawaiian archipelago species. The 50 endangered or threatened species addressed in this draft recovery plan are all endemic to the Hawaiian Islands, and include 35 plants, 13 invertebrates, and 2 birds. The draft recovery plan includes specific goals, objectives, and criteria that should be met to enable us to consider removing any of the species from the Federal List of Endangered and Threatened Wildlife and Plants. We request review and comment on this draft recovery plan from the public and local, State, and Federal agencies.

Background

Recovery of endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of our endangered species program and the Endangered Species Act (Act; 16 U.S.C. 1531 *et seq.*) Recovery means improvement of the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. The Act requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species.

The objective of a recovery plan is to provide a framework for the recovery of a listed species so that protection under the Act is no longer necessary. A recovery plan includes scientific information about the species and provides criteria and actions necessary for us to be able to reclassify the species or remove it from the Federal List of Endangered and Threatened Wildlife and Plants. Recovery plans help guide our recovery efforts by describing actions we consider necessary for the species' conservation and for estimating time and costs for implementing needed recovery measures.

Species Addressed in Recovery Plan

This draft recovery plan addresses 50 species, as described in the table below.

Scientific name	Common name	Listing rule	Status	Distribution
Plants				
Asplenium diellaciniatum	No common name	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Calamagrostis expansa	Maui reedgrass	81 FR 67786 (September 30, 2016).	Endangered	Maui, Hawaii Island (likely extirpated).
Canavalia pubescens	Awikiwiki	78 FR 32013 (May 28, 2013).	Endangered	Maui, Lanai.
Christella boydiae (listed as *Cyclosorus boydiae*).	Kupukupu makalii	81 FR 67786 (September 30, 2016).	Endangered	Oahu, Maui, Hawaii Island (likely extirpated).
Deparia kaalaana	No common name	81 FR 67786 (September 30, 2016).	Endangered	Kauai (likely extirpated), Maui, Hawaii Island (likely extirpated).

Scientific name	Common name	Listing rule	Status	Distribution
Dryopteris glabra var. *pusilla*	Hohiu	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Exocarpos menziesii	Heau	81 FR 67786 (September 30, 2016).	Endangered	Lanai (likely extirpated), Hawaii Island.
Festuca hawaiiensis	No common name	81 FR 67786 (September 30, 2016).	Endangered	Maui (likely extirpated), Hawaii Island.
Gardenia remyi	Nanu	81 FR 67786 (September 30, 2016).	Endangered	Kauai, Molokai, Maui, Hawaii Island.
Haplostachys haplostachya	Honohono (listed as having no common name).	44 FR 62468 (October 30, 1979).	Endangered	Hawaii Island.
Huperzia stemmermanniae	No common name	81 FR 67786 (September 30, 2016).	Endangered	Maui (likely extirpated), Hawaii Island.
Joinvillea ascendens ssp. *ascendens*.	Ohe	81 FR 67786 (September 30, 2016).	Endangered	Kauai, Oahu, Molokai, Maui, Hawaii Island.
Kadua fluviatilis	Kamapuaa	81 FR 67786 (September 30, 2016).	Endangered	Kauai, Oahu.
Kadua haupuensis	No common name	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Labordia lorenciana	No common name	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Lepidium orbiculare	Anaunau	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Microlepia strigosa var. *mauiensis*	Palapalai (listed as having no common name).	81 FR 67786 (September 30, 2016).	Endangered	Oahu, Maui, Hawaii Island (likely extirpated).
Myrsine fosbergii	Kolea	81 FR 67786 (September 30, 2016).	Endangered	Kauai, Oahu.
Nothocestrum latifolium	Aiea	81 FR 67786 (September 30, 2016).	Endangered	Kauai (likely extirpated), Oahu (likely extirpated), Molokai, Maui, Lanai (likely extirpated).
Ochrosia haleakalae	Holei	81 FR 67786 (September 30, 2016).	Endangered	Maui, Hawaii Island.
Panicum fauriei var. *carteri*	Carter's panicgrass	46 FR 9976 (January 30, 1981); 48 FR 46328 (October 12, 1983).	Endangered	Oahu, Molokai, Maui.
Phyllostegia brevidens	No common name	81 FR 67786 (September 30, 2016).	Endangered	Maui, Hawaii Island.
Phyllostegia helleri	No common name	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Phyllostegia stachyoides	No common name	81 FR 67786 (September 30, 2016).	Endangered	Molokai, Maui, Hawaii Island.
Portulaca villosa	Ihi	81 FR 67786 (September 30, 2016).	Endangered	Niihau, Oahu (likely extirpated), Molokai, Maui, Lanai (likely extirpated), Kahoolawe (likely extirpated), Hawaii Island.
Pseudognaphalium sandwicensium var. *molokaiense*.	Enaena	81 FR 67786 (September 30, 2016).	Endangered	Oahu (likely extirpated), Molokai, Maui, Lanai (likely extirpated).
Ranunculus hawaiensis	Makou	81 FR 67786 (September 30, 2016).	Endangered	Molokai, Maui, Hawaii Island (likely extirpated).
Ranunculus mauiensis	Makou	81 FR 67786 (September 30, 2016).	Endangered	Kauai, Oahu (likely extirpated), Molokai (likely extirpated), Maui, Hawaii Island.
Sanicula sandwicensis	No common name	81 FR 67786 (September 30, 2016).	Endangered	Maui, Hawaii Island.
Santalum involutum	Iliahi	81 FR 67786 (September 30, 2016).	Endangered	Kauai.
Sicyos lanceoloideus	Anunu	81 FR 67786 (September 30, 2016).	Endangered	Kauai, Oahu.
Sicyos macrophyllus	Anunu	81 FR 67786 (September 30, 2016).	Endangered	Maui (likely extirpated), Hawaii Island.
Solanum nelsonii	Popolo	81 FR 67786 (September 30, 2016).	Endangered	Kure, Midway, Pearl and Hermes, Laysan (likely extirpated), Nihoa (likely extirpated), Niihau, Oahu, Molokai, Maui (likely extirpated), Hawaii Island (likely extirpated).
Stenogyne angustifolia (listed as *Stenogyne angustifolia* var. *angustifolia*).	No common name	44 FR 62468 (October 30, 1979).	Endangered	Molokai (likely extirpated), Maui (likely extirpated), Hawaii Island.
Wikstroemia skottsbergiana	Akia	81 FR 67786 (September 30, 2016).	Endangered	Kauai.

Invertebrates

Scientific name	Common name	Listing rule	Status	Distribution
Drosophila differens	Hawaiian picture-wing fly	71 FR 26835 (May 9, 2006).	Endangered	Molokai.
Drosophila heteroneura	Hawaiian picture-wing fly	71 FR 26835 (May 9, 2006).	Endangered	Hawaii Island.
Drosophila mulli	Hawaiian picture-wing fly	71 FR 26835 (May 9, 2006).	Threatened	Hawaii Island.
Drosophila neoclavisetae	Hawaiian picture-wing fly	71 FR 26835 (May 9, 2006).	Endangered	Maui (possibly extirpated).
Drosophila ochrobasis	Hawaiian picture-wing fly	71 FR 26835 (May 9, 2006).	Endangered	Hawaii Island.
Hylaeus anthracinus	Anthracinan yellow-faced bee (listed as Bee, yellow-faced).	81 FR 67786 (September 30, 2016).	Endangered	Oahu, Molokai, Maui, Lanai (likely extirpated), Kahoolawe, Hawaii Island.
Hylaeus assimulans	Assimulans yellow-faced bee (listed as Bee, yellow-faced).	81 FR 67786 (September 30, 2016).	Endangered	Oahu (likely extirpated), Maui, Lanai, Kahoolawe.
Hylaeus facilis	Easy yellow-faced bee (listed as Bee, yellow-faced).	81 FR 67786 (September 30, 2016).	Endangered	Oahu, Molokai, Maui (possibly extirpated), Lanai (likely extirpated).
Hylaeus longiceps	Longiceps yellow-faced bee (listed as Bee, yellow-faced).	81 FR 67786 (September 30, 2016).	Endangered	Oahu, Molokai, Maui, Lanai.
Megalagrion nesiotes	Flying earwig Hawaiian damselfly.	75 FR 35990 (June 24, 2010).	Endangered	Maui, Hawaii Island (likely extirpated).
Megalagrion pacificum	Pacific Hawaiian damselfly	75 FR 35990 (June 24, 2010).	Endangered	Kauai (likely extirpated), Oahu (likely extirpated), Molokai (likely extirpated), Lanai (likely extirpated), Maui, Hawaii Island.
Megalagrion xanthomelas	Orangeblack Hawaiian damselfly.	81 FR 67786 (September 30, 2016).	Endangered	Oahu, Molokai, Lanai (extirpated), Maui, Hawaii Island.
Procaris hawaiana	Anchialine pool shrimp	81 FR 67786 (September 30, 2016).	Endangered	Maui, Hawaii Island.
Birds				
Drepanis coccinea	Iiwi (honeycreeper)	82 FR 43873 (September 20, 2017).	Threatened	Kauai, Oahu (likely extirpated), Molokai (possibly extirpated), Lanai (extirpated), Maui, Hawaii Island.
Hydrobates castro (listed as *Oceanodroma castro*).	Band-rumped storm-petrel, Hawaii DPS (distinct population segment); also known as akeake.	81 FR 67786 (September 30, 2016).	Endangered	Lehua, Kauai, Oahu (extirpated), Molokai (extirpated), Maui (possibly extirpated), Lanai, Kahoolawe (possibly extirpated), Hawaii Island.

Recovery Planning Process

The Service is now using a process termed recovery planning and implementation (RPI) (see *https://www.fws.gov/endangered/esa-library/pdf/RPI.pdf*). The RPI approach is intended to reduce the time needed to develop and implement recovery plans, increase recovery plan relevancy over a longer timeframe, and add flexibility to recovery plans so they can be adjusted for new information or circumstances. Under RPI, a recovery plan includes the statutorily required elements under section 4(f) of the Act (objective and measurable recovery criteria, site-specific management actions, and estimates of time and costs), along with a concise introduction and our strategy to achieve species recovery. The RPI recovery plan is supported by two supplementary documents: A species status assessment or species report, which describes the best available scientific information related to the biological needs of the species and assessment of threats; and the recovery implementation strategy, which details the particular near-term activities needed to implement the recovery actions identified in the recovery plan. Under this approach, we can incorporate new information on species biology or details of recovery implementation by updating these supplementary documents, without concurrent revision of the entire recovery plan, unless changes to statutorily required elements are necessary.

Recovery Plan Components

The draft recovery plan for 50 Hawaiian archipelago species is supported by species reports that describe the best available scientific information on species biology, status, and threats for each of the 50 species addressed in the draft recovery plan. These species reports are available within the species profiles for each of the species at *https://ecos.fws.gov.* We are in the process of coordinating with conservation partners at the State of Hawaii's Department of Land and Natural Resources, Division of Forestry and Wildlife; the Counties of Kauai, Honolulu, Maui, and Hawaii; interagency Plant Extinction Prevention Program; research institutions; watershed partnerships; public and private stakeholders; and national parks to identify the highest-priority actions for recovery of these species that will be part of a recovery implementation strategy.

Major threats to the various Hawaiian archipelago species addressed in this draft recovery plan include habitat degradation, predation and herbivory by nonnative mammals and invertebrates; disease spread by nonnative species;

and competition with invasive nonnative plant species. Achieving recovery for the 50 species will require assessments of populations and their habitats; selection of sites for long-term conservation; control of threats; development of regulatory protections; species-specific research; and translocation of species in order to maximize resiliency, redundancy, and representation. A detailed recovery strategy for each species group or species is presented in the main body of the recovery plan.

Request for Public Comments

Section 4(f) of the Act requires us to provide public notice and an opportunity for public review and comment during recovery plan development. By policy we also request peer review of recovery plans (59 FR 34270; July 1, 1994). In an appendix to the approved final recovery plan, we will summarize and respond to the issues raised during public comment and peer review. Substantive comments may or may not result in changes to the recovery plan. Comments regarding recovery plan implementation will be forwarded as appropriate to Federal or other entities so that they can be taken into account during the course of implementing recovery actions.

We will consider all comments we receive by the date specified in **DATES** prior to final approval of the plan.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

The authority for this action is section 4(f) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Robyn Thorson,

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2022–03614 Filed 2–23–22; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

2022 Final List of Critical Minerals

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice.

SUMMARY: By this notice, the Secretary of the Interior, acting through the Director of the U.S. Geological Survey (USGS), presents the 2022 final list of critical minerals and the methodology used to develop the list. The 2022 final list of critical minerals, which revises the final list published by the Secretary in 2018, includes the following 50 minerals: Aluminum, antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluorspar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc, and zirconium.

ADDRESSES: Public comments received on the draft list of critical minerals are available at *www.regulations.gov* under docket number DOI–2021–0013.

FOR FURTHER INFORMATION CONTACT: James Mosley, (703) 648–6312, *jmosely@usgs.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 or dial 711 to contact Mr. Mosley during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with this individual. You will receive a reply during normal business hours. Normal business hours are 9:00 a.m. to 5:30 p.m., Monday through Friday, except for Federal holidays.

SUPPLEMENTARY INFORMATION: Pursuant to Section 7002 of the Energy Act of 2020 (the Energy Act) (Pub. L. 116–260), on November 9, 2021, the Secretary of the Interior, acting through the Director of the U.S. Geological Survey (USGS), published in the **Federal Register** a draft list of 50 mineral commodities proposed for inclusion on the Interior Department's list of critical minerals and the methodology USGS used to create the list. 86 FR 62199. The **Federal Register** notice provided for a 30-day public comment period, which closed on December 9, 2021. On December 14, 2021, the USGS published a notice in the **Federal Register** extending the comment period by 32 days. 86 FR 71083. The public comment period closed on January 10, 2022. The comments are available for public viewing at *www.regulations.gov* under docket DOI–2021–0013. Consistent with the methodology described in the November 2021 **Federal Register** notice, the 2022 final list of critical minerals revises the Interior Department's final list of critical minerals, which it published in 2018 pursuant to Executive Order 13817—A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals. 83 FR 23295.

USGS received 1,073 comments during the extended comment period and received 4 letters after the comment period. Two comments were made anonymously, 996 were from individuals, and 77 were submitted on behalf of organizations. The comments included 91 requests to include specific minerals, including copper, phosphate, silver, and lead, which also were not on the 2018 final list, and helium, potash, and uranium, which were on the 2018 final list, but not on the draft list. Many of the comments requesting to include these specific minerals noted their importance or provided other qualitative rationale for their inclusion. However, the comments did not identify any inaccuracies in the data used to conduct the quantitative evaluation in accordance with the published USGS methodology, nor did they identify any single points of failure. USGS applied the quantitative methodology to each of the minerals requested for inclusion that were not on the draft list, and per the criteria articulated in the **Federal Register** Notice publishing the draft list at 86 FR 62199, a qualitative evaluation was conducted only when other evaluations were not possible. After applying the methodology, USGS determined that the minerals requested for inclusion did not meet the criteria for inclusion on the final list.

There were 991 requests, the vast majority of which were form comments, supporting the removal of uranium (included on the 2018 final list) from the 2022 final list. The comments also included 5 requests supporting the exclusion of other specific minerals, including copper, helium, potash, rhenium, and strontium, none of which the USGS had proposed for inclusion on the list. As noted above, USGS received requests to include four minerals that other commenters also requested to exclude: Copper, helium, potash, and uranium.

Some commenters took issue with USGS's reliance on the Mineral Policy Act of 1970 to characterize uranium as a fuel mineral. Even assuming the

Mineral Policy Act of 1970 does not inform the meaning of ''fuel mineral'' in the Energy Act, uranium nevertheless qualifies as a ''fuel mineral'' under the latter statute. The Energy Act excludes ''fuel minerals'' from the definition of critical minerals, and uranium is used as a fuel: While uranium has important non-fuel uses, it is a major fuel commodity in the United States.

Many public comments addressed issues not directly associated with the development of the 2022 final list of critical minerals. Instead, they addressed regulatory and policy issues. These comments will be passed on to other agencies for appropriate consideration.

A small number of comments requested the addition of processed mineral products that were not evaluated for inclusion on the list in this cycle. These included high purity silicon metal and boron carbide, for example, materials for which USGS does not have sufficient data to evaluate at this stage. The USGS appreciates the input from stakeholders and is identifying opportunities to include evaluation of these and other minerals or mineral products in the next update of the methodology.

The Department's list of critical minerals is not static and will be reviewed at least every three years and revised as necessary to reflect current data on supply, demand, and concentration of production, as well as current policy priorities, as required under the Energy Act. The 2022 final list of critical minerals was created using the most recent available data for non-fuel minerals and the current state of the methodology for evaluation of criticality.

The methodology used to develop the 2022 final list of critical minerals is based on the definition of ''critical mineral'' and the criteria specified in The Energy Act. The methodology was published by the USGS in 2020 [1] and 2021 [2] and includes three evaluations: (1) A quantitative evaluation of supply risk wherever sufficient data were available, (2) a semi-quantitative evaluation of whether the supply chain had a single point of failure, and (3) a qualitative evaluation when other evaluations were not possible. The quantitative evaluation uses (A) a net import reliance indicator of the dependence of the U.S. manufacturing sector on foreign supplies, (B) an enhanced production concentration indicator which focuses on production concentration outside of the United States, and (C) weights for each producing country's production contribution by its ability or willingness to continue to supply the United States. Further details on the underlying rationale and the specific approach, data sources, and assumptions used to calculate each component of the supply risk metrics are described in the references cited in this notice.

Several comments addressed the overall methodology that USGS used to develop the list, including assertions that the USGS should include additional quantitative or qualitative factors. USGS appreciates these suggestions and will consider them in future updates to the methodology. However, the USGS did not find that any of the comments identified technical flaws in the factors considered or data used in the quantitative methodology that would warrant any changes in the methodology.

After considering all comments received, the USGS believes that the methodology described in USGS Open-File Report 2021–1045 (*https://doi.org/10.3133/ofr20211045*) remains a valid basis for the review and revision of the list of critical minerals. Therefore, the USGS is hereby finalizing the draft list of 50 critical minerals as the final list. A listing of which critical minerals are predominantly recovered as byproducts and further rationale for excluding copper, helium, lead, phosphate, potash, rhenium, silver, strontium, and uranium from the 2022 final list of critical minerals are outlined in the draft list of critical minerals published in the **Federal Register** at 86 FR 62199. Host minerals for critical minerals that are predominantly recovered as byproducts are identified in USGS Open-File Report 2021–1045, p. 11.

The U.S. Government and other organizations may also use other definitions and rely on other criteria to identify a mineral as critical. In addition, there are many minerals not on the 2022 final list of critical minerals that are nevertheless important to the economic and national security of the United States. This 2022 final list of critical minerals is not intended to replace related terms and definitions of minerals that are deemed strategic, critical or otherwise important.

[1] Nassar, N.T., Brainard, J., Gulley, A., Manley, R., Matos, G., Lederer, G., Bird, L.R., Pineault, D., Alonso, E., Gambogi, J., Fortier, S.M., 2020, Evaluating the mineral commodity supply risk of the U.S. manufacturing sector Sci. Adv., 6(8) (2020), p. eaay8647, *https://doi.org/10.1126/sciadv.aay8647*.

[2] Nassar, N.T., and Fortier, S.M., 2021, Methodology and technical input for the 2021 review and revision of the U.S. Critical Minerals List: U.S. Geological Survey Open-File Report 2021–1045, 31 p., *https://doi.org/10.3133/ofr20211045*.

Authority: E.O. 13817, 82 FR 60835 (December 26, 2017) and The Energy Act of 2020, Section 7002 of Title VII (December 27, 2020).

James D. Applegate,

Associate Director for Natural Hazards, Exercising the Delegated Authority of the Director, U.S. Geological Survey.

[FR Doc. 2022–04027 Filed 2–22–22; 4:15 pm]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX22LR000F60100; OMB Control Number 1028–0062]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Industrial Minerals Surveys

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the U.S. Geological Survey (USGS) is proposing to renew an Information Collection with revisions.

DATES: Interested persons are invited to submit comments on or before March 28, 2022.

ADDRESSES: Send your comments on this Information Collection Request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to the U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0062 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Elizabeth S. Sangine by email at *escottsangine@usgs.gov,* or by telephone at 703–648–7720. You may also view the ICR at *https://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 6, 2021, (see 86 FR 35524). One comment was received from the Bureau of Economic Analysis supporting the collection of these data as nationally important.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comments addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS minerals information Program; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: Respondents to these forms supply the USGS with domestic production and consumption data for industrial mineral commodities, some of which are considered strategic and critical to assist in determining National Defense Stockpile goals. These data and derived information will be published as chapters in Minerals Yearbooks, monthly Mineral Industry Surveys, annual Mineral Commodity Summaries, and special publications for use by government agencies, industry education programs, and the general public.

Title of Collection: Industrial Minerals Surveys.

OMB Control Number: 1028–0062.

Form Number: Various, 38 forms.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Business or other for-profit institutions: U.S. nonfuel minerals producers and consumers of industrial minerals. Public sector: State and local governments.

Total Estimated Number of Annual Respondents: 17,053.

Total Estimated Number of Annual Responses: 17,053.

Estimated Completion Time per Response: For each form, the burden time ranges from 10 minutes to 5 hours.

Total Estimated Number of Annual Burden Hours: 11,727.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: There are no ''nonhour cost'' burdens associated with this IC.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authorities for this action are the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Materials and Minerals Policy, Research and Development Act of 1980 (30 U.S.C. 1601 *et seq.*), the National Mining and Minerals Policy Act of 1970 (30 U.S.C. 21(a)), the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98 *et seq.*), and the Defense Production Act (50 U.S.C. 2061 *et seq.*).

Michael Magyar,

Associate Director, National Minerals Information Center, U.S. Geological Survey.

[FR Doc. 2022–03891 Filed 2–23–22; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–33422; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before February 12, 2022, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by March 11, 2022.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before February 12, 2022. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

GEORGIA

De Kalb County

College Avenue Bridge, Covered Bridge Ln. (1000 Robert E. Lee Blvd., Stone Mountain Park), Stone Mountain vicinity, SG100007520

MASSACHUSETTS

Middlesex County

Browne-Masonic Building, 126–150 Pleasant St., Malden, SG100007522

MICHIGAN

Wayne County

Burbank, Luther, Elementary School, (Public Schools of Detroit MPS), 15600 East State Fair Ave., Detroit, MP100007521

MISSOURI

Crawford County

Shamrock Court, (Route 66 in Missouri MPS), 1246 South Service Rd., Sullivan, MP100007530

Jackson County

St. Francis Xavier Parish Church & Rectory, 1001 East 52nd St., Kansas City, SG100007529

OREGON

Multnomah County

South Park Blocks, 1003 SW Park Ave., Portland, SG100007518

TEXAS

Harris County

Pasadena Post Office, 102 North Munger St., Pasadena, SG100007523

UTAH

Morgan County

Morgan Historic District, Roughly bounded by 700 East, 350 North, 400 West and 300 South, Morgan, SG100007519

Salt Lake County

Taylorsville LDS Ward Meetinghouse, 1247 West 4800 South, Taylorsville, SG100007527

VERMONT

Bennington County

Bull, William C., House, 219 Pleasant St., Bennington, SG100007531

VIRGINIA

Nottoway County

WSVS Radio Station, 1032 Melody Ln., Crewe, SG100007524

Additional documentation has been received for the following resource:

UTAH

Salt Lake County

University Neighborhood Historic District (Additional Documentation), Roughly bounded by 500 South, South Temple St., 100 East, and University St., Salt Lake City, AD95001430

Authority: Section 60.13 of 36 CFR part 60.

Dated: February 15, 2022.

Sherry A. Frear,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2022–03862 Filed 2–23–22; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–33363; PPWOCRAD10, PUC00RP14.R50000]

Notice of Public Meeting of the Cold War Advisory Committee; Cancellation

AGENCY: National Park Service, Interior.

ACTION: Notice; cancellation of meeting.

SUMMARY: The National Park Service gives notice that the Cold War Advisory Committee virtual meeting scheduled for Thursday, February 24, 2022, has been cancelled. The notice is in the **Federal Register** of Friday, November 19, 2021, in FR Doc. 2021–25299, in the first and second columns of page 64956.

FOR FURTHER INFORMATION CONTACT: Lisa P. Davidson, Ph.D., Program Manager, National Historic Landmarks Program, National Park Service, telephone at (202) 354–2179, or email *lisa_davidson@nps.gov.*

Authority: 5 U.S.C. appendix 2

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2022–03931 Filed 2–23–22; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1299]

Certain Mobile Telephones, Tablet Computers With Cellular Connectivity, and Smart Watches With Cellular Connectivity, Components Thereof, and Products Containing Same; Notice of Institution

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on January 18, 2022, under section 337 of the Tariff Act of 1930, as amended, on behalf of Ericsson Inc. of Plano, Texas and Telefonaktiebolaget LM Ericsson of Sweden. Supplements to the complaint were filed on January 27, 2022, January 31, 2022, and February 7, 2022. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile telephones, tablet computers with cellular connectivity, and smart watches with cellular connectivity, components thereof, and products containing same by reason of infringement of certain claims of U.S. Patent No. 8,102,805 (''the '805 patent''); U.S. Patent No. 9,532,355 (''the '355 patent''); U.S. Patent No. 11,139,872 (''the '872 patent''); and U.S. Patent No. 10,425,817 (''the '817 patent''). The complaint further alleges that an industry in the United States exists or is in the process of being established as required by the applicable Federal Statute.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2021).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on February 17, 2022, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 19–20, 22–27, and 29–32 of the '805 patent; claims 17, 19–21, 23–24, 26–27, 29, and 33–36 of the '355 patent; claims 7–12 and 19–24 of the '872 patent; and claims 10–16 of the '817 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''iPhones, iPads, and Apple Watches with cellular connectivity'';

(3) Pursuant to Commission Rule 210.50(b)(l), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the

statutory public interest factors set forth in 19 U.S.C. 1337(d)(l), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are: Ericsson Inc., 6300 Legacy Drive, Plano, TX 75024;

Telefonaktiebolaget LM Ericsson, Torshamnsgatan 21, Kista, SE–164 83 Stockholm, Sweden;

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served: Apple, Inc., 1 Apple Park Way, Cupertino, CA 95014;

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: February 17, 2022.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2022–03883 Filed 2–23–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1300]

Certain Mobile Phones, Tablet Computers, Smart Watches, Smart Speakers, and Digital Media Players, and Products Containing Same; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on January 18, 2022, under section 337 of the Tariff Act of 1930, as amended, on behalf of Ericsson Inc. of Plano, Texas and Telefonaktiebolaget LM Ericsson of Sweden. Supplements were filed on February 2 and February 7, 2022. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile phones, tablet computers, smart watches, smart speakers, and digital media players, and products containing same by reason of infringement of certain claims of U.S. Patent No. 7,151,430 (''the '430 patent''); U.S. Patent No. 9,509,273 (''the '273 patent''); U.S. Patent No. 9,853,621 (''the '621 patent''); U.S. Patent No. 7,957,770 (''the '770 patent''); and U.S. Patent No. 9,705,400 (''the '400 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia Proctor, Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2021).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on February 17, 2022, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 2, 3, 5–8, and 11–18 of the '430 patent; claims 1–3, 7, 12, and 18 of the '273 patent; claims 1, 9, 10, 12–14, 18, and 20 of the '621 patent; claims 1, 2, 4, 7–10, 12, 15, and 16 of the '770 patent; and claims 1, 2, 8, 10, 13, and 15 of the '400 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''Apple mobile phones, tablet computers, smart watches, smart speakers, and digital Media Players, and products containing same'';

(3) Pursuant to Commission Rule 210.50(b)(l), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. l337(d)(l), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following

are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Ericsson Inc., 6300 Legacy Drive, Plano, TX 75024

Telefonaktiebolaget LM Ericsson, Torshamnsgatan 21, Kista, SE–164 83 Stockholm Sweden

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served:

Apple Inc., One Apple Park Way, Cupertino, California 95014

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a/the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: February 17, 2022.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2022–03881 Filed 2–23–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1301]

Certain Mobile Phones and Tablet Computers, All With Switchable Connectivity Institution of Investigation; Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on January 18, 2022, under section 337 of the Tariff Act of 1930, as amended, on behalf of Ericsson Inc. of Plano, Texas and Telefonaktiebolaget LM Ericsson of Sweden. Supplements were filed on February 7, 2022. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile phones and tablet computers, all with switchable connectivity, and products containing same by reason of infringement of certain claims of U.S. Patent No. 8,792,454 (the '454 patent); U.S. Patent No. 10,880,794 (''the '794 patent''); and U.S. Patent No. 8,472,999 (''the '999 patent). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia Proctor, Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2021).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on February 17, 2022, *Ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 4, 6, and 8 of the '454 patent; claims 11–20 of the '794 patent; and claims 11–19 of the '999 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''Apple mobile phones and tablet computers, all with switchable connectivity'';

(3) Pursuant to Commission Rule 210.50(b)(l), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. l337(d)(l), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are: Ericsson Inc., 6300 Legacy Drive, Plano, TX 75024, Telefonaktiebolaget LM Ericsson, Torshamnsgatan 21, Kista, SE–164 83 Stockholm, Sweden.

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served: Apple Inc., One Apple Park Way, Cupertino, California 95014;

(c) The Office of Unfair Import Investigations, U.S. International Trade

Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a/the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: February 17, 2022.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2022–03882 Filed 2–23–22; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–962]

Importer of Controlled Substances Application: Scottsdale Research Institute

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Scottsdale Research Institute has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTAL INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before March 28, 2022. Such persons may also file a written request for a hearing on the application on or before March 28, 2022.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 5, 2022, Scottsdale Research Institute, 5436 East Tapekim Road, Cave Creek, Arizona 85331, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to import Marihuana Extract (7350), Marijuana (7360) and Tetrahydrocannabinols (7370) as flowering plants to support analytical purposes, research, and the manufacturing of dosage forms for clinical trials. This notice does not constitute an evaluation or determination of the merits of the company's application. The company plans to import fungi material from which Psilocybin (7437) and Psilocyn (7438) will be produced for further manufacturing prior to use in research and clinical trials. No other activity for these drug codes is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03904 Filed 2–23–22; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–957]

Importer of Controlled Substances Application: Mylan Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Mylan Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTAL INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before March 28, 2022. Such persons may also file a written request for a hearing on the application on or before March 28, 2022.

ADDRESSES: The DEA requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *http://www.regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on December 15, 2021, Mylan Inc., 3711 Collins Ferry Road, Morgantown, West Virginia 26505–2362, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Amphetamine	1100	II
Methylphenidate	1724	II
Oxycodone	9143	II
Hydromorphone	9150	II
Methadone	9250	II
Morphine	9300	II
Fentanyl	9801	II

The company plans to import finished dosage forms for analytical testing and distribution for clinical trials. No other activity for these drug codes is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of the Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03907 Filed 2–23–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–960]

Importer of Controlled Substances Application: Myonex Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Myonex Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to SUPPLEMENTAL INFORMATION listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before March 28, 2022. Such persons may also file a written request for a hearing on the application on or before March 28, 2022.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All request for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on December 10, 2021, Myonex Inc., 100 Progress Drive, Horsham, Pennsylvania 19044, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Amphetamine	1100	II
Lisdexamfetamine	1205	II
Methylphenidate	1724	II
Nabilone	7379	II
Oxycodone	9143	II
Hydromorphone	9150	II
Hydrocodone	9193	II
Morphine	9300	II
Oxymorphone	9652	II
Fentanyl	9801	II

The company plans to import the listed controlled substances for clinical trials, research, and analytical purposes. No other activity for these drug codes is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03903 Filed 2–23–22; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–953]

Bulk Manufacturer of Controlled Substances Application: Benuvia Therapeutics Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Benuvia Therapeutics Inc., has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before April 25, 2022. Such persons may also file a written request for a hearing on the application on or before April 25, 2022.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on November 16, 2021, Benuvia Therapeutics Inc., 2700 Oakmont Drive, Round Rock, Texas 78665, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Tetrahydrocannabinols	7370	I
3,4-Methylenedioxyamphetamine	7400	I
3,4-Methylenedioxymethamphetamine	7405	I
5-Methoxy-N-N-dimethyltryptamine	7431	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
5-Methoxy-N,N-diisopropyltryptamine	7439	I

The company plans to bulk manufacture the listed controlled substances for the internal use intermediates or for sale to its customers. The company plans to manufacture the above-listed controlled substances in bulk to produce finished dosage forms and conduct research to develop new drug products and for clinical studies. In reference to drug code 7370 (Tetrahydrocannabinols), the company plans to bulk manufacture this drug as a synthetic. No other activities for these drug codes are authorized for this registration.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03897 Filed 2–23–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–956]

Bulk Manufacturer of Controlled Substances Application: Johnson Matthey Pharmaceutical Materials Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Johnson Matthey Pharmaceutical Materials Inc. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before April 25, 2022. Such persons may also file a written request for a hearing on the application on or before April 25, 2022.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on November 5, 2021, Johnson Matthey Pharmaceutical Materials Inc., 25 Patton Road, Devens, Massachusetts 01434, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Amphetamine	1100	II
Methylphenidate	1724	II
Nabilone	7379	II
Hydrocodone	9193	II
Levorphanol	9220	II
Thebaine	9333	II
Alfentanil	9737	II
Remifentanil	9739	II
Sufentanil	9740	II

The company plans to support its other manufacturing facilities located in West Deptford, New Jersey and Conshohocken, Pennsylvania with manufacturing and analytical testing. In reference to drug code 9333 as bulk, the company plans to manufacture a Thebaine derivative for distribution to its customers. No other activities for these drug codes are authorized for this registration.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03901 Filed 2–23–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–958]

Importer of Controlled Substances Application: Noramco Coventry LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Noramco Coventry LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before March 28, 2022. Such persons may also file a written request for a hearing on the application on or before March 28, 2022.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All request for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on September 29, 2021, Noramco Coventry LLC, 498 Washington Street, Coventry, Rhode Island 02816, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Tetrahydrocannabinols	7370	I
Methylphenidate	1724	II
Oxycodone	9143	II
Hydromorphone	9150	II
Hydrocodone	9193	II
Morphine	9300	II
Opium, raw	9600	II
Oxymorphone	9652	II
Poppy Straw Concentrate	9670	II

The company plans to import Opium, raw (9600), and Poppy Straw Concentrate (9670) in order to bulk manufacture-controlled substances in Active Pharmaceutical Ingredient (API) form. The company will use the imported narcotic raw materials in ancillary activities including process development and analytical studies. Noramco does not anticipate redistributing the imported narcotic raw materials domestically to other registered bulk manufacturers. The company plans to import the other listed controlled substances for internal reference standards use only. No other activity for these drug codes is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03902 Filed 2–23–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–955]

Bulk Manufacturer of Controlled Substances Application: Scottsdale Research Institute

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Scottsdale Research Institute, has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before April 25, 2022. Such persons may also file a written request for a hearing on the application on or before April 25, 2022.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on January 10, 2022, Scottsdale Research Institute, 5436 East Tapekim Road, Cave Creek, Arizona 85331, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to bulk manufacture the listed controlled substances for clinical trials. No other activities for these drug codes are authorized for this registration.

Matthew J. Strait,

Deputy Assistant Administrator.

[FR Doc. 2022–03900 Filed 2–23–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; New Collection; Request for Temporary Eligibility To Hold a Sensitive Position—ATF Form 8620.69

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ) will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and, if so, how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *The Title of the Form/Collection:* Request for Temporary Eligibility to Hold a Sensitive Position.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: ATF Form 8620.69. Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households.

Other: None.

Abstract: The Request for Temporary Eligibility to Hold a Sensitive Position—ATF Form 8620.69 will be used to determine if a candidate for Federal or contractor employment at the Bureau of Alcohol, Tobacco, Firearms and Explosives can be granted a temporary eligibility to hold a sensitive position prior to the completion and adjudication their full background investigation.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 2,000 respondents will respond to this collection once annually, and it will take each respondent approximately 5 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 167 hours, which is equal to 2,000 (total respondents) * 1 (# of response per respondent) * .833333 (5 minutes or the time taken to prepare each response).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Mail Stop 3.E–405A, Washington, DC 20530.

Dated: February 18, 2022.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2022–03941 Filed 2–23–22; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB 1140–0108]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; Extension With Change of a Currently Approved Collection; Forensic Firearm Training Request for Non-ATF Employees—ATF Form 7110.15

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection (IC) OMB 1140–0108 (Forensic Firearm Training Request for Non-ATF Employees—ATF Form 7110.15) is being updated to include a new telephone number for the training program. The proposed IC is also being published to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and will be accepted for 60 days until April 25, 2022.

FOR FURTHER INFORMATION CONTACT: If you have additional comments regarding the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, contact: Jodi Marsanopoli, Office of Science and Technology Laboratory Services, National Laboratory Center, by mail at 6000 Ammendale Road, Ammendale, MD 20705, email at *Jodi.Marsanopoli@atf.gov,* or telephone at 202–527–5078.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and, if so, how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection* (check justification or form 83): Extension with Change of a Currently Approved Collection.

2. *The Title of the Form/Collection:* Forensic Firearm Training Request for Non-ATF Employees.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number (if applicable): ATF Form 7110.15. Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal Government.

Other (if applicable): State, Local, or Tribal Government.

Abstract: The Forensic Firearm Training Request for Non-ATF Students—ATF Form 7110.15) is used by Federal, State and local, and international law enforcement personnel to register, obtain course information, and/or evaluate forensic firearms investigative techniques training offered by the Bureau of Alcohol, Tobacco, Firearms and Explosives.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 75 respondents will respond to this collection once annually, and it will take each respondent approximately 6 minutes to complete their responses.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 7.5 or 8 hours, which is equal to 75 (total respondents) * 1 (# of response per respondent) * .1 (6 minutes or the time taken to prepare each response).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Mail Stop 3.E–405A, Washington, DC 20530.

Dated: February 18, 2022.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2022–03940 Filed 2–23–22; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Post Enrollment Data Collection for Job Corps Participants

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL), Employment Training Administration (ETA) is soliciting comments concerning a proposed revision to the authority to conduct the information collection request (ICR) titled, ''Post Enrollment Data Collection for Job Corps Participants.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by April 25, 2022.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free by contacting Hilda Alexander by telephone at 202–693–3843 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *Alexander.Hilda@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Job Corps, 200 Constitution Avenue NW, Room N4507, Washington, DC 20210; by email: *Alexander.Hilda@dol.gov;* or by Fax 202–693–3113.

FOR FURTHER INFORMATION CONTACT: Hilda Alexander by telephone at 202–693–3843 (this is not a toll free number) or by email at *Alexander.Hilda@dol.gov.*

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Job Corps is the nation's largest residential, educational, and career technical training program for opportunity youth. The Economic Opportunity Act established Job Corps in 1964, and it currently operates under the authority of the Workforce Innovation and Opportunity Act (WIOA) of 2014. For over 54 years, Job Corps has helped prepare over three million students between the ages of 16 and 24 for success in our nation's workforce. With 121 centers in 50 states, Puerto Rico, and the District of Columbia, Job Corps assists students across the nation in attaining academic credentials, including High School Diplomas (HSD) and/or High School Equivalency (HSE), and career technical training credentials, including industry-recognized certifications, state licensures, and pre-apprenticeship credentials.

Job Corps is a national program administered by the U.S. Department of Labor (DOL) through the Office of Job Corps and six Regional Offices. DOL awards and administers contracts for the recruiting and screening of new students, center operations, and the placement and transitional support of graduates and former enrollees. Large and small corporations and nonprofit organizations manage and operate 95 Job Corps centers under contractual agreements with DOL. These contract Center Operators are selected through a competitive procurement process that evaluates potential operators' technical expertise, proposed costs, past performance, and other factors, in accordance with the Competition in Contracting Act and the Federal Acquisition Regulations. Many of the current contractors operate more than one center. The two centers under demonstration grants are run by State of Idaho and the National Guard job Challenge program respectively. Of the 121 current centers, 24 are managed and operated by the U.S. Department of Agriculture—Forest Service (USDA) via an interagency agreement. Additionally, there are 26 public colleges and universities operating Job Corps Scholars Program demonstration grants.

The Workforce Innovation Opportunity Act (WIOA), Section 116(b)(2)(A)(i) and Section 159(c)(4) authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless OMB approves the collection under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB control number 1205–0426.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–ETA.

Type of Review: Revision.

Title of Collection: Post Enrollment Data Collection for Job Corps Participants.

Forms: Appendices A, B, C, and D.

OMB Control Number: 1205–0426.

Affected Public: Individuals or Households and Private Sector businesses, grantees or other for-profits.

Estimated Number of Respondents: 49,200.

Frequency: Varies.

Total Estimated Annual Responses: 93,400.

Estimated Average Time per Response: Varies.

Estimated Total Annual Burden Hours: 21,700 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Angela Hanks,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2022–03878 Filed 2–23–22; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Order of Succession

AGENCY: Office of Inspector General (OIG), Labor.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Vacancies Reform Act of 1998 and the Inspector General Act of 1978, as amended, U.S. Department of Labor (DOL) Inspector General (IG) Larry D. Turner is updating and publishing the succession order and delegations of authorities, which provides guidance on the transfer of functions and duties of the IG, as well as other Office of Inspector General (OIG) central management functions, regardless of what events necessitate such transfer. This revision supersedes any prior DOL OIG notice of succession order.

FOR FURTHER INFORMATION CONTACT: Delores ''Dee'' Thompson, Counsel to the Inspector General, Office of Inspector General, Room S–5502, 200 Constitution Avenue NW, Washington, DC 20210, 202–693–5107, *OLS-Public@oig.dol.gov.*

SUPPLEMENTARY INFORMATION: DOL OIG is issuing this notice to publish an updated line of succession and delegations of authority within DOL OIG. Pursuant to the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d) and the Inspector General Act of 1978, as amended (5 U.S.C. app. 3), the IG has designated the detailed sequence of succession as follows:

I. During any period in which the DOL IG, dies, resigns, or is otherwise unable to perform the functions and duties of the office, and unless the President designates another officer to perform the functions and duties of the position, the Deputy IG, as the designated first assistant to the IG, shall temporarily perform the IG's functions and duties in an acting capacity, pursuant to and subject to the Federal Vacancies Reform Act (5 U.S.C. 3345–3349d). However, the Deputy IG does not become the acting IG if, during the 365-day period preceding the IG's death, resignation, or the beginning of the period in which the IG is unable to serve, the Deputy IG served as Deputy IG for less than 90 days and the President has nominated the Deputy IG to the IG position. In the absence of the IG and Deputy IG, the officials designated below, in the order listed, shall become the acting Deputy IG and so shall temporarily perform the delegable functions and duties of the IG. This order may be changed by a delegation in writing from the IG, or by the Deputy IG while acting in the absence of the IG:

1. Assistant IG for Investigations (AIG/I);

2. Assistant IG for Audit (AIG/A);

3. Counsel to the IG;

4. Assistant IG for Management and Policy (AIG/MP)

5. An official serving in a Senior Executive Service (SES) or Senior Level (SL) permanent position in DOL OIG who has the longest tenure with DOL OIG.

6. A GS–15 Special Agent-in-Charge or Audit Director in a permanent position in DOL OIG who has the longest tenure with DOL OIG.

II. For purposes of this order of succession, a designated official is a person holding a permanent appointment to the position. Persons filling positions in an acting capacity do not substitute for officials holding a permanent appointment to a position. If a position is vacant or an official occupying the position on a permanent basis is absent or unavailable, authority passes to the next available official occupying a position in the order of succession.

III. This delegation is not in derogation of any authority residing in the above officials relating to the operation of their respective programs, nor does it affect the validity of any delegations currently in force and effect and not specifically cited as revoked or revised herein.

IV. The authorities delegated herein may not be re-delegated.

Authority: 5 U.S.C. 3345–3349d; 5 U.S.C. app. 3.

Dated: February 16, 2022.

Larry D. Turner,

Inspector General.

[FR Doc. 2022–03848 Filed 2–23–22; 8:45 am]

BILLING CODE 4510–HV–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Settlement Agreements Between a Plan and a Party in Interest

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) gives the Secretary of Labor the authority to ''grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a).'' This information collection request (ICR) relates to two prohibited transaction class exemptions (PTEs) that the Department of Labor (the Department) has granted, both of which involve settlement agreements. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 9, 2021 (86 FR 62208).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–EBSA.

Title of Collection: Settlement Agreements Between a Plan and a Party in Interest.

OMB Control Number: 1210–0091.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 19.

Total Estimated Number of Responses: 5,130.

Total Estimated Annual Time Burden: 100 hours.

Total Estimated Annual Other Costs Burden: $1,351.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: February 17, 2022.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2022–03877 Filed 2–23–22; 8:45 am]

BILLING CODE 4510–29–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Reemployment of Annuitants

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM) offers the public and other federal agencies the opportunity to comment on an information collection request (ICR), Reemployment of Annuitants.

DATES: Comments are encouraged and will be accepted until April 25, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by the following method:

- *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation may be obtained by contacting the Retirement Services Publications Team, U.S. Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or you may obtain this information by emailing *Cyrus.Benson@opm.gov,* sending a fax to (202) 606–0910, or calling (202) 606–4808.

SUPPLEMENTARY INFORMATION: The regulations under 5 CFR 837.103 require agencies to collect certain information from retirees who become employed in Government positions and provide this information to OPM, such as the reemployed retiree's name, date of birth, Social Security number (if applicable), retirement claim number, a description of the kind of appointment, and whether the amount of annuity allocable to the period of reemployment will be withheld from the reemployed retiree's pay. Agencies need to collect timely information regarding the type and amount of annuity the reemployed retiree receives so the agency may determine the correct rate of the reemployed retiree's pay. Agencies provide this information to OPM so OPM may determine whether the reemployed retiree's annuity must be terminated.

As required by the Paperwork Reduction Act of 1995, Public Law 104–13, 94 Stat. 2812 (1980), and as amended by the Clinger-Cohen Act, Public Law 104–106, 110 Stat. 186 (1996), OPM is soliciting comments for this collection of information (OMB No. 3206–0211). The Office of Management and Budget is particularly interested in comments that consider the following:

1. Whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Whether the quality, utility, and clarity of the information collected could be enhanced; and
4. Whether the burden of the collection of information could be minimized on those who are responsible for providing this information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses).

Analysis

Agency: Retirement Services, Office of Personnel Management.

Title: 5 CFR 837.103, Reemployment of Annuitants.

OMB Number: 3206–0211.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 3,000.

Estimated Time per Respondent: 5 minutes.

Total Burden Hours: 250.

Office of Personnel Management.

Kellie Cosgrove Riley,

Director, Office of Privacy and Information Management.

[FR Doc. 2022–03855 Filed 2–23–22; 8:45 am]

BILLING CODE 6325–38–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 14, 2022, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 129 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–41, CP2022–47.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2022–03950 Filed 2–23–22; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 10, 2022, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 214 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–39, CP2022–46.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2022–03949 Filed 2–23–22; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94273; File No. SR–DTC–2022–001]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Clearing Agency Model Risk Management Framework

February 17, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 11, 2022, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Clearing Agency Model Risk Management Framework (''Framework'') of DTC and its affiliates that are central counterparties, National Securities Clearing Corporation (''NSCC'') and Fixed Income Clearing Corporation (''FICC,'' and together with NSCC, the ''CCPs,'' and the CCPs together with DTC, the ''Clearing Agencies'').[5] The Framework has been adopted by the Clearing Agencies to support their compliance with Rule 17Ad–22(e) (the ''Covered Clearing Agency Standards'') under the Act,[6] and, in this regard, applies solely to models [7] utilized by the Clearing Agencies that are subject to the model risk management requirements set forth in Rules 17Ad–22(e)(4), (e)(6), and (e)(7) under the Act.[8]

The proposed rule change would amend the Framework [9] to (i) harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework; (ii) provide that provisional approvals of models may be extended if approved by the Managing Director of Model Risk Management (''MRM'') and notice thereof is given to the Group Chief Risk Officer; however, in no event shall any provisional approval, together with any extension(s) granted, exceed one year and (iii) make other technical and clarifying changes to the text, as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Framework to (i) harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework; (ii) provide that provisional approvals of models may be extended if approved by the Managing Director of MRM and notice thereof is given to the Group Chief Risk Officer; however, in no event shall any provisional approval, together with any extension(s) granted, exceed one year and (iii) make other technical and clarifying changes to the text, as described below.

Background

The Covered Clearing Agency Standards require that the Clearing Agencies take steps to manage the models that they employ in identifying, measuring, monitoring, and managing their respective credit exposures and liquidity risks, including that the Clearing Agencies conduct daily backtesting of model performance, periodic sensitivity analyses of models, and annual validation of models.[10] The Framework is maintained by the Clearing Agencies to support their compliance with the requirements of the Covered Clearing Agency Standards relating to model risk management.

The Framework outlines the applicable regulatory requirements mentioned above, describes the risks that the Clearing Agencies' model risk management program are designed to mitigate, and sets forth specific model risk management practices and requirements adopted by the Clearing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The Framework sets forth the model risk management practices that the Clearing Agencies follow to identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The Framework is filed as a rule of the Clearing Agencies. *See* Securities Exchange Act Release Nos. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File Nos. SR–DTC–2017–008, SR–FICC–2017–014, SR–NSCC–2017–008) (''2017 Notice''); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (File Nos. SR–DTC–2020–008, SR–FICC–2020–004, SR–NSCC–2020–008); and 92379 (July 13, 2021), 86 FR 38143 (July 19, 2021) (File No. SR–DTC–2021–013), 92381 (July 13, 2021), 86 FR 38163 (July 19, 2021) (File No. SR–NSCC–2021–008), and 92380 (July 13, 2021), 86 FR 38140 (July 19, 2021) (File No. SR–FICC–2021–006) (collectively, the ''MRMF Filings'').

[6] 17 CFR 240.17Ad–22(e). Each of DTC, NSCC and FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with Rule 17Ad–22(e).

[7] Pursuant to Section 3.1 of the Framework, the Clearing Agencies have adopted the following definition of ''model'': ''[M]odel'' refers to a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates. A ''model'' consists of three components: (i) An information input component, which delivers assumptions and data to the model; (ii) a processing component, which transforms inputs into estimates; and (iii) a reporting component, which translates the estimates into useful business information. The definition of model also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature. *See* 2017 Notice, *supra* note 5. *See also* Supervisory Guidance on Model Risk Management, SR Letter 11–7 Attachment, dated April 4, 2011, issued by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, *available at https://www.federalreserve.gov/supervisionreg/srletters/sr1107a1.pdf,* page 3.

[8] 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC because DTC is not a central counterparty.

[9] Amending the Framework does not require any changes to the Rules, By-Laws and Organization Certificate of DTC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf*) (the ''DTC Rules''), the Rulebook of the Government Securities Division of FICC (*available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf*) (the ''GSD Rules''), the Clearing Rules of the Mortgage-Backed Securities Division of FICC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf*) (the ''MBSD Rules''), or the Rules & Procedures of NSCC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf*) (the ''NSCC Rules,'' and collectively with the DTC Rules, GSD Rules, and MBSD Rules, the ''Rules''), because the Framework is a standalone document. *See* MRMF Filings, *supra* note 5.

[10] *See* 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

Agencies to ensure compliance with the Covered Clearing Agency Standards. These practices and requirements include, among other things, the maintenance of a model inventory (''Model Inventory''), a process for rating model materiality and complexity, processes for performing model validations and resolving findings identified during model validation, and processes for model performance monitoring, including backtesting and sensitivity analyses. The Framework also describes applicable internal ownership and governance requirements.[11]

The proposed rule change would harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework. The proposed rule change would also amend the Framework to provide the Clearing Agencies with the ability to make limited time extensions for provisional approvals of models. In this regard, the proposed rule change is designed to facilitate the Clearing Agencies' ability to prudently manage contingencies relating to events or changes of circumstance that may impact the Clearing Agencies' management of credit risk, margin, and liquidity risk management models, in accordance with the Framework. Additionally, the proposed rule change would make technical and clarifying changes to the text of the Framework, as described below.

Proposed Rule Change

Eliminate References to ''Full'' Model Validation

With respect to model validation, the Covered Clearing Agency Standards refer to the term simply as ''model validation,'' as defined by Rule 17Ad–22(a)(9) under the Act.[12] However, the Framework refers to model validation both as a ''full model validation'' and ''model validation,'' and as an undefined and defined term depending on usage. For example, Section 1 (Executive Summary) of the Framework describes Section 3 (Model Risk Management Framework), among other things, as including a discussion on ''full model validation.'' Yet, ''Model Validation'' is first defined in Section 3 as the definition used by the Covered Clearing Agency Standards, which does not use the modifier ''full.'' Moreover, references to full model validation and model validation in the Framework have the same meaning, as the Framework does not distinguish between the two.

To address these unnecessary variations, the Clearing Agencies propose to harmonize the terminology used in the Framework relating to model validation, with the applicable term used in the Covered Clearing Agency Standards, by deleting ''full'' in all instances where it appears as a modifier to ''model validation'' in the Framework. In this regard, the word ''full'' preceding ''model validation'' would be deleted from the Framework in all instances where it appears, including (i) from the reference in Section 1 of the Framework, mentioned above, (ii) renaming Section 3.3 of the Framework, named Full Model Validation, as ''Model Validation,'' and (iii) deleting four appearances of the word ''full'' before ''Model Validation'' in the text of Section 3.

Extension of Provisional Approvals of Models

The Covered Clearing Agency Standards require that the Clearing Agencies identify, measure, monitor, and manage their respective credit exposures and liquidity risks by performing model validations of their respective credit risk and liquidity risk models not less than annually or more frequently as may be contemplated by the applicable Clearing Agency's established risk management framework.[13] A covered clearing agency that is a central counterparty must perform a model validation for its margin system and related models not less than annually or more frequently as may be contemplated by such central counterparty's risk management framework.[14]

Section 3.6 of the Framework (Model Approval and Control) provides that new models, and material changes to existing models, shall undergo model validation by MRM and then be approved by MRM prior to business use.

In the absence of a Model Validation, provisional approvals with respect to new models and material changes to existing models may be issued to allow a model to be used for urgent business purposes prior to the completion of MRM's Model Validation. Such provisional approval requests must be presented by the applicable Model Owner[15] to MRM, which may provisionally approve the model for a limited period not to exceed six months.

The Framework does not provide for extensions of this six-month provisional approval period. However, MRM has observed, over time and since the Framework was initially filed,[16] that it could take longer than six months to complete a model validation in accordance with the timeframe set forth in Section 3.3 of the Framework. For example, a model that has been provisionally approved and put into use while undergoing further modification and/or enhancement by a third-party developer, cannot undergo validation by MRM until such time as the developer has completed its process and made the enhanced model available to the Clearing Agencies. Considering the amount of time it may take for the developer to complete and deliver the modification and/or enhancement to the Clearing Agencies, as well as MRM's validation process itself, it may be necessary for the model to operate under provisional approval for a period greater than six months.

Therefore, pursuant to the proposed rule change, the Clearing Agencies would amend Section 3.6 of the Framework to provide that provisional approvals of models may be extended if approved by the Managing Director of MRM and notice thereof is given to the Group Chief Risk Officer; however, in accordance with the Covered Clearing Agency Standards requirements that credit, liquidity and margin models, as applicable, be validated at least annually,[17] in no event shall any provisional approval, together with any extension(s) granted, exceed one year. In this regard, the proposed rule change would accommodate the incorporation of any modifications and enhancements identified by a developer into a provisionally approved model prior to model validation, and still allow the model validation to be completed within a timeframe that would be consistent with the requirements of both

[11] *See* MRMF Filings, *supra* note 5, for additional information on the contents of the Framework.

[12] The term ''model validation'' means an evaluation of the performance of each material risk management model used by a covered clearing agency (and the related parameters and assumptions associated with such models), including initial margin models, liquidity risk models, and models used to generate clearing or guaranty fund requirements, performed by a qualified person who is free from influence from the persons responsible for the development or operation of the models or policies being validated. 17 CFR 240.17Ad–22(a)(9).

[13] *See* 17 CFR 240.17Ad–22(e)(4)(vii) and (e)(7)(vii).

[14] *See* 17 CFR 240.17Ad–22(e)(6)(vii).

[15] Pursuant to Section 3.1 of the Framework, the ''Model Owner'' is the person designated by the applicable business area or support function to be responsible for a particular model. The Model Owner is recorded in the Model Inventory.

[16] *Supra* note 5.

[17] *See* 17 CFR 240.17Ad–22(e)(4)(vii), (e)(6)(vii) and (e)(7)(vii).

the Framework and the Covered Clearing Agency Standards.

Technical and Clarifying Changes

Section 1 (Executive Summary)

A sentence in Footnote 8 under Section 1 (Executive Summary) of the Framework would be revised for clarity and grammatical usage. The footnote describes the Model Risk Tolerance Statement and the Market Risk Tolerance Statement, which are listed in Section 1 among a series of documents used by the Clearing Agencies to support their execution of the Framework. In describing the Market Risk Tolerance Statement, the footnote states: ''. . . the Market Risk Tolerance Statement, which articulates, among other things, risk tolerance levels covering margin backtests covering backtest coverage and stress tests covering exposure to extreme market moves.'' The proposed rule change would eliminate certain repetitive usage of ''covering'' and ''coverage'' in the text quoted above such that the applicable text would read as follows: ''. . . the Market Risk Tolerance Statement, which articulates, among other things, risk tolerance levels covering margin backtests and stress tests related to exposure to extreme market moves.''

Section 2 (Model Risk Management Requirements)

The first paragraph of Section 2 is intended by the Clearing Agencies to describe that in compliance with Rules 17Ad–22(e)(4)(vii),[18] and (e)(7)(vii) [19] of the Covered Clearing Agency Standards, each Clearing Agency is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to perform model validations on its credit risk models and liquidity risk models not less than annually or more frequently as may be contemplated by the Clearing Agency's risk management framework established pursuant to Rule 17Ad–22(e)(3).[20] The main text of the paragraph contains typographical errors, in that in place of the reference to section (e) in each of the three rules citied in the paragraph, it instead includes an erroneous reference to a section (C). However, the footnotes to these references contain the correct citations. The Clearing Agencies would revise the main text of the paragraph to correct the erroneous references to section (C) to instead refer to section (e).

[18] 17 CFR 240.17Ad–22(e)(4)(vii).

[19] 17 CFR 240.17Ad–22(e)(7)(vii).

[20] 17 CFR 240.17Ad–22(e)(3).

Section 3.1 (Model Inventory)

Section 3.1 (Model Inventory) (i) sets forth the definition of model adopted by the Clearing Agencies,[21] (ii) defines MRM as responsible for model risk management as a second-line function that is charged with determining whether any proposed method, system, or approach designed for Clearing Agency use meets the definition of model, (iii) provides a definition of Model Inventory as the definitive list of models subject to the Framework, (iv) describes a model inventory survey that is conducted at least annually across the Clearing Agencies to confirm that the Model Inventory is current, and (v) describes that all models subject to the Framework are validated, as described in the Framework.

The proposed rule change would make technical and clarifying changes to the second paragraph of this section, which states:

> The Model unit within the Group Chief Risk Office that is responsible for model risk management as a second-line function (''MRM'') is charged with determining whether any proposed method, system, or approach designed for Clearing Agency use meets the above definition. All models subject to this Framework will be added to the definitive list of models (''Model Inventory'') and tracked by MRM. A Model Inventory Survey is conducted at least annually across the Clearing Agencies to confirm the Model Inventory is current (''Annual Model Inventory Survey''). During the Annual Model Inventory Survey, any business area or support function intending to have a model developed for Clearing Agency use will submit materials relevant to such proposed model for MRM to review and assess whether such proposed model will be added to the Model Inventory. The person designated by the applicable business area or support function to be responsible for a particular model (''Model Owner'') is recorded as the Model Owner for such model by MRM in the Model Inventory.

First, for enhanced clarity, the first sentence of the paragraph would be revised to replace the initial reference to ''The Model'' with ''Model Risk Management'' and define the term as ''MRM'' directly after it is mentioned, rather than after additional descriptive text that follows in the sentence. The proposed rule change would also eliminate the reference to MRM as a ''unit'' because this reference is redundant given the context describing the functionality of MRM implies that it is a unit or group. Conforming grammatical changes would also be made to delete ''that'' after ''Group Chief Risk Office'' and add ''and'' after ''second-line function.'' The third sentence of the paragraph would be revised to make the initial letters in the words ''Model Inventory Survey'' lower case (*i.e.,* ''model inventory survey'') as the term is not defined, but rather the reference is part of the description of the defined term ''Annual Model Inventory Survey'' that appears at the end of the sentence. The fourth sentence of the paragraph would be revised for consistency by replacing ''business area or support function'' with ''business line or functional unit,'' as the latter reflects usage of text in underlying MRM internal procedures.

[21] *See supra* note 7.

Second, the Clearing Agencies believe that adding to the Model Inventory certain methodologies used to implement configuration choices made by the Clearing Agencies, such as data sources, model parameters, and model performance monitoring, including but not limited to backtesting, that are not inherent to model selection or design and that do not materially impact a model's results, and are not models subject to this Framework, may provide benefits for the Clearing Agencies in terms of monitoring and tracking of such methodologies. In this regard, the Clearing Agencies would add text to reflect that such methodologies may be added to the Model Inventory at MRM's discretion.

Finally, in the third paragraph of this section, the Clearing Agencies would change a reference to ''risk management standards'' to ''Standards'' to conform to the defined term for the Covered Clearing Agency Standards used throughout the Framework.

Section 3.2 (Model Materiality and Complexity)

Section 3.2 of the Framework describes that a model's output can affect decision making (*e.g.,* decisions with respect to Clearing Fund/Participants Fund, backtesting, and stress testing measures), which may have a material impact on the Clearing Agency, and that each model subject to the Framework is assigned a materiality/complexity rating in this regard. The section states that ''[m]ateriality/complexity index assignments are made at the time the applicable model is added to the Model Inventory and are used by MRM for Model Validation prioritization. All model materiality/complexity index assignments are reviewed at least annually by MRM, as well as by the Model Risk Governance Council (''MRGC''), the forum for review of model risk matters.'' Pursuant to the proposed rule change, the Clearing Agencies would replace both appearances of the words ''index assignments'' in these two sentences with ''scores.'' This change would align the text of the Framework with MRM's practice, whereby MRM reviews materiality and complexity scores of a model, which directly determine the applicable materiality/complexity rating, at least annually.[22]

Section 3.3 (Full Model Validation)

In addition to deleting ''full'' where it appears as a modifier to ''model validation'' in Section 3.3 of the Framework, as described above, including in the title of the section, the proposed rule change would make other technical and clarifying changes to this section.

In a paragraph that describes Model Validation activities performed for new models:

(i) A reference to ''model development documentation and testing'' would be changed to ''model documentation and development testing'';

(ii) a reference to ''evaluation of data inputs and parameters'' would be changed to ''evaluation of model inputs and parameters'';

(iii) a reference to ''review of numerical implementation (including replication for certain key model components, which will vary from model to model)'' would be changed to ''review of model implementation for consistency with documentation'';

(iv) a reference to ''independent testing: sensitivity analysis, stress testing, and benchmarking, as appropriate'' would be changed to ''independent testing: model output evaluation, backtesting, sensitivity analysis, stress testing, and benchmarking, as appropriate''; and

(v) a reference to ''evaluation of model outputs, model performance, and back testing'' would be changed to ''evaluation of model performance monitoring (or ''MPM'') plan and results.'' Similarly, a reference to ''model performance monitoring reports'' in Section 3.8 of the Framework (Model Performance Monitoring) would be revised to consider the definition of the term MPM described above. In this regard, this reference in Section 3.8 would be revised to instead refer to ''MPM reports.''

In the second paragraph of this section, the third sentence states: ''The Application Development Department for the Clearing Agencies will perform certain production release quality assurance checks (*e.g.,* user acceptance testing/systems integration testing (UAT/SAT)).'' Pursuant to the proposed rule change, this sentence would be revised to delete ''Application Development Department for the'' and ''(UAT/SAT)''. This change would generalize the text to eliminate the need to revise the document in the event the name of the area that performs such testing changes.

The Clearing Agencies would also revise this paragraph with respect to text relating to ratings assigned to a model upon validation. In this regard, the Framework currently describes that the result of each Model Validation is a model validation report prepared by MRM (''Model Validation Report''), a key section of which is the summary of all findings and recommendations ranked according to the findings' severity level, inclusive of any identified model limitations and compensating controls for the model. This text would be revised to remove the reference to recommendations as part of the Model Validation Report because, pursuant to MRM's procedures, while the Model Validation Report includes findings, it does not include recommendations. In addition, the severity level of the findings is described in this section to be classified as H, M or L, which the Clearing Agencies intend as abbreviations for ''High,'' ''Medium,'' and ''Low.'' However, as these abbreviations are not otherwise defined in the Framework, the Clearing Agencies would replace the abbreviations with the full spelling of the classifications, such that the instances in the text of ''H,'' ''M,'' and ''L'' would be replaced with ''High,'' ''Medium,'' and ''Low,'' respectively.

This paragraph also describes that MRM will provide an overall assessment for each model having undergone a Model Validation (''Model Grade'').[23] The Clearing Agencies propose to clarify this text such that it describes each model that has been approved, as being rated (in the form of a Model Grade) by MRM, rather than providing an overall assessment.

This paragraph states further that the Model Grade, together with the model materiality/complexity index assignment, serves to provide context for MRM's overall assessment of the model's suitability and performance for its intended purpose. As with the revision described immediately above, the Clearing Agencies would remove the reference to a Model Grade as representing an overall assessment of the model. In its place, the proposed rule change would provide a description that the Model Grade outlines the overall assessed quality of the model developer's efforts to develop the model and the extent to which the model developer has effectively reduced model risk during model development.

In addition, it is the Model Grade that rates these development quality considerations and risk factors, and the Model Grade does not depend on the model materiality/complexity index assignment and is not intended to signify the overall suitability of the model for its intended purpose. Therefore, the Clearing Agencies would clarify this point to remove the reference to model materiality and complexity as being a factor in determining the Model Grade, as well as delete text that indicates the Model Grade reflects the suitability of a model for its intended purpose.

Section 3.4 (Periodic Model Validation)

Section 3.4 of the Framework describes that MRM shall perform a Model Validation for each model subject to this Framework that is approved for use in production not less than annually (or more frequently as may be contemplated by such Clearing Agency's established risk management framework), including each credit risk model,[24] each liquidity risk model,[25] and each CCP's margin systems and related models,[26] as required by the risk management standards set forth in the Framework. This type of Model Validation is referred to generally in the Framework as ''periodic'' Model Validation. In this regard, for the sake of clarity, the Clearing Agencies would insert the word ''periodic'' as a modifier for Model Validation in the first sentence of the first paragraph of this section.

In addition, the Clearing Agencies would delete a paragraph from this section that states: ''Periodic Model Validations follow full Model Validation standards. In certain cases, MRM may determine extra Model Validation activities are warranted based on previous Model Validation work and findings, changes in market conditions, or because performance monitoring of a particular model warrants extra validation.'' This text would be deleted because, as noted above, the Framework recognizes one definition of Model Validation and the provisions relating to how Model Validation is conducted apply to all

[22] Specifically, the Clearing Agencies use the ''DTCC Model Development Standards,'' which is a document describing that materiality and complexity scores for a model, which scores are based on certain factors, underlie the determination of the materiality/complexity rating of the model. In accordance with the DTCC Model Development Standards, factors relating to the materiality score include model usage, model hierarchy and model exposure. The factors relating to the complexity score include structural complexity, and data availability and treatment.

[23] The Clearing Agencies' current grading scale consists of three grades—''A,'' ''B,'' and ''C.'' Any Clearing Agency may add or remove grading levels in its discretion, the parameters of which shall be reflected in written procedures established by such Clearing Agency.

[24] *See* 17 CFR 240.17Ad–22(e)(4)(vii).

[25] *See* 17 CFR 240.17Ad–22(e)(7)(vii).

[26] *See* 17 CFR 240.17Ad–22(e)(6)(vii).

models regardless of timing, and it is unnecessary to state that periodic Model Validation follows the same standards as ''full'' Model Validation since there is only one concept of Model Validation. In addition, the reference to extra Model Validation activities is duplicative as the Framework contains other text indicating that Model Validations may be performed for a given model more frequently than on the minimum annual basis.

Section 3.5 (Model Change Management)

Section 3.5 of the Framework describes provisions relating to changes in models. The text of this section refers to a ''version change'' of a model in describing changes to third-party models. The section is intended to apply to any changes to a model and it is unnecessary to modify the word change, including with ''version.'' Therefore, the Clearing Agencies would delete the word ''version'' where it appears before ''change'' in this section.

Section 3.6 (Model Approval and Control)

In addition to the proposed change described above to extend the period allowable for a provisional approval to remain in effect, the Clearing Agencies would revise a sentence in Section 3.6 of the Framework that states: ''Provisional approval requests along with appropriate control measures must be presented by the applicable Model Owner to MRM.'' The sentence as written is duplicative as the first paragraph of Section 3.6 states that models must be submitted to MRM for approval. However, given the focus of this section on the approval of models, the Clearing Agencies believe that the section should more clearly state where the approval authority resides for provisional models. As stated above, it is MRM's responsibility to approve models. Therefore, the Clearing Agencies would revise the sentence described above to read: ''Provisional approval requests along with appropriate control measures must be approved by MRM.''

A sentence that states: ''All new models, and all material changes to existing models, shall undergo Model Validation by MRM and then be approved by MRM prior to business use'' would be revised to replace the word ''then'' with ''must'' to clarify the requirement that a model must be approved by MRM prior to use.

Section 3.7 (Resolution of Model Validation Findings)

Consistent with the proposed change described above to remove the description of a group within the Group Chief Risk Office as a ''unit,'' the Clearing Agencies would revise a reference to ''the Operational Risk Management unit'' to delete the word ''unit'' from this reference. Also, the Clearing Agencies would delete the word ''the'' before ''Operational Risk'' because it would not be grammatically correct when ''unit'' is deleted. In addition, the group name of ''Operational Risk Management,'' as set forth in this reference, would be revised to ''Operational Risk'' to reflect a recent name change of this group from Operational Risk Management to Operational Risk. In connection with this name change, the term ''ORM'' that is used in this section to define ''Operational Risk Management'' would be deleted. Also, in this regard, two subsequent references to ORM in the Framework, which appear in Section 3.7 and Section 4.2, respectively, would be removed and replaced with ''Operational Risk.''

Section 3.8 (Model Performance and Monitoring)

In addition to a change relating to the definition of MRM described above, the Clearing Agencies would revise a footnote in Section 3.8 of the Framework. The footnote 29 describes the role Quantitative Risk Management (''QRM'') performs with respect to the CCPs' margin models. A sentence within the note states that a representative of QRM self-elects as the owner of a margin model. In fact, the CCPs' procedures would require the representative to be appointed as the owner of a model. Therefore, the Clearing Agencies would revise this footnote to reflect that a representative of QRM is appointed as the owner of a model.

This section also contains a statement that MRM is responsible for providing oversight of model performance monitoring activities by setting organizational standards and providing critical analysis for identifying model issues and/or limitations. This statement has a footnote that states the organizational standards apply to DTCC's [27] subsidiaries, as applicable. This footnote is unnecessary because the Framework applies only to the Clearing Agencies and no other subsidiaries of DTCC, and the mention to DTCC's subsidiaries in general is extraneous. Therefore, pursuant to the proposed rule change, the Clearing Agencies would delete this footnote.

Section 3.9 (Backtesting)

Section 3.9 of the Framework contains a description of backtesting performed by the Clearing Agencies. Pursuant to the proposed rule change, this section would be revised to delete references to backtesting performed by DTC and related text, including applicable metrics and thresholds, and a related footnote that describes the designation of DTC account families by DTC Participants for purposes of managing Collateral Monitor and Net Debit Cap. The proposed change would be consistent with the Covered Clearing Agency Standards, which pursuant to Rule 17Ad–22(e)(6) [28] requires certain backtesting to be performed by the CCPs. As indicated above, this rule does not apply to DTC.[29] In this regard, a reference to a backtesting metric (Collateral Group Collateral Monitor Coverage) mentioned in Section 4.2 of the Framework (Escalation) would also be deleted.

Section 4.2 (Escalation)

A paragraph within Section 4.2 of the Framework states: ''On at least a monthly basis, the key metrics identified in Section 3.9 are reviewed by the Market and Liquidity Risk Management unit within the Group Chief Risk Office and reported to the MRC [30] by the group within the Group Chief Risk Office responsible for risk reporting. Threshold breaches will be reviewed by the Managing Directors within the Financial Risk Management area (including the Market and Liquidity Risk Management unit) of the Group Chief Risk Office, and in the case of CFR Coverage breaches by the CCPs and Collateral Group Collateral Monitor Coverage by DTC, escalated to the BRC in accordance with the applicable Risk Tolerance Statement.''

Pursuant to the proposed rule change, first, the reference to a Market and Liquidity Risk Management unit would be revised to reflect only the Market Risk Management unit. Today, the Market Risk Management and Liquidity Risk Management areas are under separate management, and Market Risk Management is the area that performs the review of key metrics described in the paragraph.

[27] The Depository Trust & Clearing Corporation (''DTCC'') is the parent company of the Clearing Agencies.

[28] *See* 17 CFR 240.17Ad–22(e)(6).

[29] *See supra* note 8.

[30] MRC refers to the Management Risk Committee of the Boards of Directors of the Clearing Agencies.

Second, the Clearing Agencies would revise the paragraph to remove the parenthetical that states, ''including the Market and Liquidity Risk Management unit,'' after a reference to the Financial Risk Management area's role in the review of threshold breaches of key metrics, as both units are part of Financial Risk Management, and therefore the parenthetical is unnecessary. In this regard, the proposed modification would enhance readability.

Third, the Clearing Agencies would remove the text ''by the group within the Group Chief Risk Office responsible for risk reporting'' as it is unnecessary since it can be inferred that reports would be provided by the group responsible for such reporting.

2. Statutory Basis

The Clearing Agencies believe that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[31] as well as Rules 17Ad–22(e)(4), (e)(6), and (e)(7) thereunder,[32] for the reasons described below.

Section 17A(b)(3)(F) of the Act [33] requires, *inter alia,* that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. As described above, the proposed rule change enhances (i) the Clearing Agencies' ability to complete modifications to a provisionally approved model prior to the performance of a model validation and (ii) the text of the Framework to facilitate clarity for the areas within the Clearing Agencies that perform responsibilities with regard to model risk management and compliance with the Framework. By enhancing the Framework in this regard, the proposed rule change supports the Clearing Agencies' performance of their responsibilities under the Framework, including but not limited to assuring that models developed function as intended to support the Clearing Agencies in identifying, measuring, monitoring, and managing their respective credit exposures, liquidity risks and, as applicable, the maintenance of sufficient margin to cover these risks. In this regard, the proposed rule change would promote the safeguarding of securities and funds which are in the custody or control of the Clearing Agencies or for which they are responsible, by promoting the ability of the Clearing Agencies to manage credit exposures and liquidity risk that may impact the safeguarding of those funds and securities.

Rules 17Ad–22(e)(4), (e)(6), and (e)(7) under the Act [34] require, *inter alia,* that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage risks associated with its credit risk management models, margin models, and liquidity risk management models, respectively, as applicable. As discussed above, the proposed rule change enhances (i) the Clearing Agencies' ability to complete modifications to a provisionally approved model prior to the performance of a model validation and (ii) the text of the Framework to facilitate clarity for the areas within the Clearing Agencies that perform responsibilities with regard model risk management and compliance with the Framework. By enhancing the Framework in this regard, the proposed rule change supports the Clearing Agencies' performance of their responsibilities under the Framework, including but not limited to assuring that models developed function as intended to support the Clearing Agencies in identifying, measuring, monitoring, and managing their respective credit exposures, liquidity risks and, as applicable, the maintenance of sufficient margin to cover these risks. Therefore, the Clearing Agencies believe that the proposed changes to the Framework are consistent with Rules 17Ad–22(e)(4), (e)(6), and (e)(7).[35]

(B) Clearing Agency's Statement on Burden on Competition

The Clearing Agencies do not believe that the proposed rule change would have any impact, or impose any burden, on competition because the proposed rule change simply modifies the Framework governing the management of model risk by the Clearing Agencies and (a) would not effectuate any changes to the Clearing Agencies' model risk management tools as they apply to their respective Members or Participants and (b) would not have an effect with respect to the obligations of participants utilizing Clearing Agency services.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Clearing Agencies have not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

The Clearing Agencies reserve the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [36] and Rule 19b–4(f)(6) thereunder.[37]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[31] 15 U.S.C. 78q–1(b)(3)(F).

[32] 17 CFR 240.17Ad–22(e)(4), (e)(6), and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[33] 15 U.S.C. 78q–1(b)(3)(F).

[34] 17 CFR 240.17Ad–22(e)(4), (e)(6), and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[35] *Id.*

[36] 15 U.S.C. 78s(b)(3)(A).

[37] 17 CFR 240.19b–4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2022–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2022–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2022–001 and should be submitted on or before March 17, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03875 Filed 2–23–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94278; File No. SR–BOX–2021–14]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, in Connection With the Proposed Establishment of BSTX LLC as a Facility of the Exchange

February 17, 2022.

I. Introduction

On June 7, 2021, BOX Exchange LLC (''Exchange'' or ''BOX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change in connection with the proposed commencement of operations of BSTX LLC (''BSTX'') as a facility of the Exchange. The proposed rule change was published for comment in the **Federal Register** on June 24, 2021.[3] On August 3, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On September 16, 2021, the Exchange filed Amendment No. 1 to the proposed rule change (''Amendment No. 1''), which replaced and superseded the proposed rule change as originally filed.[6] On September 21, 2021, the Commission published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act [7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[8] On December 15, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[9] the Commission designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1.[10] On January 18, 2022, the Exchange filed Amendment No. 2, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.[11] The Commission

---

[38] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92206 (June 17, 2021), 86 FR 33402 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-box-2021-14/srbox202114.htm.* The Commission received one comment letter that expresses opposition to the proposal but without specificity as to why. *See* Letter from David (September 23, 2021).

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 92556, 86 FR 43572 (August 9, 2021). The Commission designated September 22, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] In Amendment No. 1, the Exchange revised the proposal to: (1) Adopt the BSTX LLC Third Amended and Restated Limited Liability Company Agreement prior to the commencement of operations of BSTX as a facility of the Exchange, which, among other things, (a) changes the legal name of the facility from ''Boston Security Token Exchange LLC'' to ''BSTX LLC,'' (b) modifies certain defined terms, including ''BSTX Product'' and ''Competing Business,'' (c) defines the term ''Governmental Authority'' and modifies certain provisions to permit access to certain confidential information by any such authority, and (d) adds a provision that would, among other things, require an effective rule filing pursuant to Section 19 of the Exchange Act prior to any Member, or Related Person of such Member, becoming a BSTX Participant if such Member, alone or together with any Related Persons of such Member, has the right to appoint more than 20% of the BSTX Directors entitled to vote; (2) provide additional information about ownership of non-voting Class B Units; (3) clarify how limitations on voting of interests in BOX Holdings are implemented by reallocating voting rights to other BOX Holdings owners, and how a similar provision in the BSTX LLC Agreement would operate; (4) discuss certain provisions and associated definitions in the BSTX LLC Agreement that are the same or different from those that currently apply to BOX Holdings and BOX Options, particularly with respect to the board structure, intellectual property, and automatic admission of Class B Units as Members; (5) provide additional description of limitations on voting and ownership of interests in the Exchange; (6) provide additional description of the roles, obligations, and authorities of BOX Digital, tZERO, and the Exchange with respect to BSTX; (7) describe the funding of operations of BSTX; (8) clarify representation of BSTX Participants on the Exchange's Board and committees, and how those representatives would be appointed at the commencement of operations; and (9) make other technical, clarifying and conforming changes.

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 93094, 86 FR 53365 (September 27, 2021) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings) (''OIP'').

[9] 15 U.S.C. 78s(b)(2).

[10] *See* Securities Exchange Act Release No. 93786, 86 FR 72296 (December 21, 2021).

[11] In Amendment No. 2, the Exchange revised the proposal to: (1) Revise the BSTX LLC Agreement by, among other things, (a) introducing certain defined terms, including ''Shortfall Amount,'' ''Statutory Disqualification,'' and ''Tax Matters Representative,'' (b) converting existing class A and class B units of BSTX to economic units and voting units of BSTX, (c) prohibiting events that would

Continued

is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2 (''BSTX Governance Proposal''), from interested persons and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Overview

As set forth in the OIP and Amendment No. 2,[12] the Exchange proposes to establish BSTX as a facility of the Exchange (as defined in Section 3(a)(2) of the Exchange Act).[13] The Exchange proposes that BSTX would operate a market for the trading of securities (''BSTX Market''), and with this proposed rule change, the Exchange proposes to adopt the BSTX LLC Third Amended and Restated Limited Liability Company Agreement (''BSTX LLC Agreement'' or ''LLC Agreement'')[14] as the source of governance and operating authority for BSTX.[15] In a separate action, the Commission approved the Exchange's proposed rule change to establish the trading rules for BSTX.[16]

Ownership interests in BSTX would be represented by two classes of Units: Economic Units[17] and Voting Units.[18] Duly admitted holders of these limited liability company interests would be ''Members'' of BSTX.[19] Economic Units would represent equity interests in BSTX and entitle holders to participate in BSTX's allocations and distributions, but would not include the right to vote.[20] Voting Units would represent voting interests in BSTX and entitle holders to participate in votes of BSTX's Members.[21] Each Member would be a holder of both Voting Units and Economic Units.[22] The total number of Voting Units would be equal to the total number of Economic Units;[23] Voting Units may not be transferred separately from their related Economic Units.[24] Unless required to be adjusted, as discussed further below,[25] each Member would hold the number of Voting Units equal to the number of Economic Units it holds.[26] A Member's level of ownership interest would be expressed in terms of its Economic Percentage Interest and Voting Percentage Interest.[27]

Upon adoption of the LLC Agreement, BOX Digital Markets LLC (''BOX Digital''), a Delaware limited liability company and a subsidiary of BOX Holdings Group LLC (''BOX Holdings''),[28] and tZERO Group, Inc. (''tZERO''), a Delaware corporation and an affiliate of *Overstock.com*, Inc. (''Overstock''),[29] would each own a 40% Economic Percentage Interest and a 20% Voting Percentage Interest in BSTX.[30]

result in any person, together with its related persons, holding an economic interest in BSTX greater than 40% or a voting interest in BSTX greater than 20% without both Exchange approval and an effective rule filing pursuant to Section 19 of the Exchange Act, (d) prohibiting BSTX Participants from holding either an economic interest or voting interest in BSTX greater than 20%, (e) modifying the structure and composition of the BSTX board of directors by limiting BOX Digital and tZERO to one director each, providing the regulatory director with voting rights, adding the BSTX CEO as a director, and providing that the independent director will serve as chairman of the board of directors, (f) providing that no person subject to a statutory disqualification will serve as a BSTX director or officer, and (g) removing the requirement that the BSTX board of directors will create and appoint audit and compensation committees; (2) specify the individuals and entities that own economic and voting interests in BSTX and at what levels, including that BOX Digital and tZERO's economic interests have been reduced to 40% each and that BOX Digital and tZERO's voting interests have been reduced to 20% each; (3) state that the Exchange will not distribute regulatory funds to its owners and that regulatory funds will not be used for non-regulatory purposes; (4) represent that the Exchange will have adequate funding for the Exchange's operations with respect to BSTX; (5) revise Exhibit 5B to propose the form of Instrument of Accession that each identified Controlling Person would sign; and (6) make other technical, clarifying and conforming changes. Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2021-14/srbox202114-20112131-265232.pdf* (''Amendment No. 2'').

[12] *See* OIP, *supra* note 8; Amendment No. 2, *supra* note 11.

[13] *See* OIP, *supra* note 8, 86 FR at 53366. Pursuant to Section 3(a)(2) of the Exchange Act, 15 U.S.C. 78c(a)(2), the term ''facility'' when used with respect to an exchange, includes ''its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.''

[14] The proposed LLC Agreement is Exhibit 5A to Amendment No. 2. *See* Amendment No. 2, *supra* note 11. Capitalized terms not otherwise defined herein have the meanings specified in the BSTX LLC Agreement.

[15] *See id.* at 3, 5.

[16] *See* Securities Exchange Act Release No. 94092 (January 27, 2022), 87 FR 5881 (February 2, 2022) (SR–BOX–2021–06) (approving the trading of equity securities on the Exchange through a facility of the Exchange known as BSTX). Among other things, the BSTX trading rules proposal established rules regarding the listing and trading of securities on BSTX and the operations of and eligibility to participate on the BSTX Market.

[17] *See* BSTX LLC Agreement, Sections 1.1 and 2.5(a); Amendment No. 2, *supra* note 11, at 7.

[18] *See* BSTX LLC Agreement, Sections 1.1 and 2.5(b); Amendment No. 2, *supra* note 11, at 7. The Exchange proposes that all Economic Units would be identical to each other and accord the holders thereof the same obligations, rights, and privileges as accorded to each other holder thereof. Similarly, all Voting Units would be identical to each other and accord the holder thereof the same obligations, rights, and privileges as accorded to each other holder thereof. *See* BSTX LLC Agreement, Sections 2.5(a), (b); Amendment No. 2, *supra* note 11, at 7.

[19] *See* BSTX LLC Agreement, Section 1.1; Amendment No. 2, *supra* note 11, at 7. Members of the Exchange that are eligible for trading on the BSTX Market would be ''BSTX Participants.'' *See* BSTX LLC Agreement, Section 1.1 (defining BSTX Participant as a firm or organization that is registered with the Exchange pursuant to Exchange Rules for purposes of participating in Trading on the BSTX Market as an order flow provider or market maker).

[20] *See* Amendment No. 2, *supra* note 11, at 7–8.

[21] *See id.* at 8; *see also id.* at 7, n.14.

[22] *See* BSTX LLC Agreement, Section 2.5(c); Amendment No. 2, *supra* note 11, at 8.

[23] *See* BSTX LLC Agreement, Section 2.5(b).

[24] *See id.* Section 7.1(a); Amendment No. 2, *supra* note 11, at 47–48.

[25] *See infra* note 102 and accompanying text.

[26] *See* BSTX LLC Agreement, Section 7.4(g)(i); Amendment No. 2, *supra* note 11, at 19–20.

[27] ''Economic Percentage Interest'' would mean, with respect to a Member, the ratio of the number of Economic Units held by the Member, directly or indirectly, of record or beneficially, to the total of all of the issued and outstanding Economic Units held by Members, expressed as a percentage. *See* BSTX LLC Agreement, Section 1.1. ''Voting Percentage Interest'' would mean, with respect to a Member, the ratio of the number of Voting Units held by the Member, directly or indirectly, of record or beneficially, to the total of all of the issued and outstanding Voting Units held by Members, expressed as a percentage. Voting Units held by a Member that are ineligible to vote would not be counted in the numerator or the denominator when determining such ratio. *See id.*

[28] The Exchange states that BOX Digital is a subsidiary of BOX Holdings and an affiliate of the Exchange, and that BSTX would be an affiliate of the Exchange. BOX Holdings owns 98% of BOX Digital and 2% of BOX Digital is held by Lisa Fall. BOX Holdings already owns one subsidiary that is an existing facility of the Exchange—BOX Options Market LLC (''BOX Options'')—which operates a market for trading option contracts on U.S. equities. BOX Holdings is the parent company for both BOX Digital and BOX Options and currently has seven separate, unaffiliated owners. *See* Amendment No. 2, *supra* note 11, at 9. The seven separate, unaffiliated owners include: MX US 2, Inc. (''MX US 2''), a wholly owned, indirect subsidiary of TMX Group Limited (''TMX''), which holds 47.89% of the outstanding units of BOX Holdings, IB Exchange Corp. (''IB''), which holds 25.5% of the outstanding units in BOX Holdings, and Citadel Securities Principal Investment LLC, which holds 15.5% of the outstanding units in BOX Holdings. The additional four owners each hold less than five percent of the outstanding units of BOX Holdings. *See id.* at 9. The Exchange states that Lisa Fall is a Director of BOX Digital. *See id.* at 8 n.18.

[29] The Exchange states that ownership of tZERO is held by Medici Ventures, L.P. (''Medici''), a Delaware limited partnership, which owns 44% of the outstanding shares of tZERO, and Overstock, a publicly held corporation organized under the laws of Delaware, which owns 43% of the outstanding shares of tZERO. An individual, Joseph Cammarata, holds 7.53% of the outstanding shares of tZERO, and the remaining shares are held in less than three percent by thirty-one individuals and entities. Pelion MV GP, L.L.C. (''Medici GP''), a Delaware limited liability company, serves as the general partner of Medici and has the sole right to manage its affairs. Medici GP owns one percent of the partnership interest in Medici and Overstock owns 99% of the partnership interests in Medici. Membership interests in Medici GP are held by fifteen individuals and entities, all of who hold less than a 25% interest. The Exchange states that both tZERO and BSTX are affiliates of Overstock, Medici, and Medici GP. *See* OIP, *supra* note 8, 86 FR at 53367–68.

[30] *See* Amendment No. 2, *supra* note 11, at 8. The Exchange states that FBP Digital LLC, which is

The Exchange proposes that pursuant to the LLC Agreement, tZERO would provide BSTX the intellectual property license and services necessary to operate the BSTX trading system.[31] The Exchange also proposes that pursuant to the LLC Agreement, the Exchange will regulate BSTX as a facility of the Exchange for the listing and trading of BSTX Products, but will not regulate any other market trading BSTX Products.[32]

As is the case with the Exchange's current facility for trading options, BOX Options, the Exchange would not hold an ownership interest in BSTX,[33] but would regulate BSTX as a facility of the Exchange pursuant to an agreement between the Exchange and BSTX (''Facility Agreement'').[34] As a self-regulatory organization (''SRO''), the Exchange has regulatory responsibility for all of its facilities, including BSTX, and must be so organized and have the capacity to carry out the purposes of the Exchange Act.[35] Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with federal securities laws and rules thereunder and the rules of the Exchange.[36] Pursuant to the LLC Agreement, the Members would agree that the Exchange would provide regulatory oversight of BSTX,[37] and the Exchange states that its powers and authority under the Facility Agreement would ensure that the Exchange would have full regulatory control over BSTX.[38] The LLC Agreement would also specifically require the Exchange to receive notice of and approve, among other things, changes to the BSTX System, and would give the Exchange the authority to direct BSTX to eliminate or prevent Regulatory Deficiencies and allow the Exchange to perform and fulfill its regulatory responsibilities under the Exchange Act.[39] The Exchange will also provide certain business services to BSTX such as providing human resources and office technology support pursuant to an administrative services agreement between the Exchange and BSTX.[40]

The Exchange proposes that, subject to the regulatory oversight by the Exchange, the board of directors of BSTX (''BSTX Board'') would manage the business and affairs of BSTX without the need for approval of the Members.[41] The Board would consist of five directors (each a ''Director''): One Director appointed by BOX Digital, so long as BOX Digital holds an Economic Percentage Interest equal to or greater than 35%, and one Director appointed by tZERO, so long as tZERO holds an Economic Percentage Interest equal to or greater than 35% (each a ''Member Director''),[42] the CEO of BSTX, a ''Regulatory Director,'' [43] and an ''Independent Director.'' [44] Generally,

wholly owned by Lisa Fall, would own an 11.1% Economic Percentage Interest in BSTX, and each of the following would own less than 5% Economic Percentage Interest: Susan Chamberlin (1.9%), Saum Noursalehi (0.4%), Will Easley (0.4%), Alan Konevsky (0.7%), Jay Fraser (1.4%), Enid Acquisition LLC (1.9%), Chris Zaremba (1.4%), and Todd Treworgy (0.4%). The Exchange also states that FBP Digital LLC will own a 19.6% Voting Percentage Interest in BSTX, and each of the following will own less than a 10% Voting Percentage Interest: Susan Chamberlin (8.8%), Saum Noursalehi (2.1%), Will Easley (2.1%), Alan Konevsky (3.1%), Jay Fraser (6.6%), Enid Acquisition LLC (wholly owned by Glen Openshaw) (8.8%), Chris Zaremba (6.6%), and Todd Treworgy (2.2%). *See id.* at 8–9. The Exchange states that Alan Konevsky is the CEO of tZERO. *See id.* at 8 n.21. The Exchange also states that the eleven Members are parties to the LLC Agreement. *See id.* at 7–8 n.15.

[31] *See* BSTX LLC Agreement, Section 3.2(b); OIP, *supra* note 8, 86 FR at 53375. The Exchange states that among other things, under an IP License and Services Agreement by and between tZERO and BSTX (''LSA''), tZERO will provide BSTX and the Exchange with a license to use tZERO's intellectual property comprising the BSTX trading system, and will provide services to BSTX related to implementing, administering, maintaining, supporting, hosting, developing, testing and securing the trading system. *See* OIP, *supra* note 8, 86 FR at 53369, 53375.

[32] *See* BSTX LLC Agreement, Section 3.2(c); Amendment No. 2, *supra* note 11, at 37. ''BSTX Product'' would mean a Security, as defined in the Exchange Rules, trading on the BSTX System. *See* BSTX LLC Agreement, Section 1.1. ''BSTX System'' would mean the technology, know-how, software, equipment, communication lines or services, services and other deliverables or materials of any kind as may be necessary or desirable for the operation of the BSTX Market. *See id.* Section 1.1.

[33] *See* OIP, *supra* note 8, 86 FR at 53366 (describing BOX Holdings ownership of BOX Options, as well as the ownership of BOX Holdings).

[34] *See id.* at 53366. The Exchange states that it currently operates BOX Options as its only facility, and that it filed a separate proposed rule change to accommodate regulation of BSTX in addition to BOX Options (''Multiple Facilities Filing''). *See id.* The Commission approved this proposal, which included amendments to the Exchange's governing documents designed to provide the Exchange the flexibility to regulate additional facilities. *See* Securities Exchange Act Release Nos. 88236 (February 19, 2020), 85 FR 10765 (February 25, 2020) (Notice of Filing of Proposed Rule Change); 88934 (May 22, 2020), 85 FR 32085 (May 28, 2020) (Order Granting Approval of a Proposed Rule Change) (''BOX–2020–04 Approval'').

[35] *See* 15 U.S.C. 78f(b)(1).

[36] *See id.; see also* Section 19(g) of the Exchange Act, 15 U.S.C. 78s(g).

[37] The Exchange proposes that the LLC Agreement would provide that the Exchange will act as the SEC-approved SRO for the BSTX Market, have regulatory responsibility for the activities of the BSTX Market, and provide regulatory services to the BSTX pursuant to the Facility Agreement. *See* BSTX LLC Agreement, Section 3.2(a); OIP, *supra* note 8, 86 FR at 53370; *see also infra* Sections III.A and III.B (describing provisions in the LLC Agreement providing for and clarifying the regulatory authority and jurisdiction of the Exchange over the BSTX facility and its Members, Officers, Directors, employees, agents, and Controlling Persons (*see infra* note 57)).

[38] *See* OIP, *supra* note 8, 86 FR at 53366. For example, the Exchange would receive notice of all planned or proposed changes to BSTX (other than with respect to Non-Market Matters). The Exchange states that this authority would ensure that while BSTX operates as a facility of the Exchange, BSTX would be required to submit any such changes to the Exchange for approval and the Exchange would have the right to direct BSTX to make any modifications deemed necessary or appropriate by the Exchange to resolve any Regulatory Deficiency. The Exchange states that this regulatory authority would override any authority of BSTX management, its Members or its Board regardless of any Member's level of ownership or control of the Board at the facility level. *See* OIP, *supra* note 8, 86 FR at 53381; Amendment No. 2, *supra* note 11, at 68.

[39] *See* BSTX LLC Agreement, Section 3.2(a); OIP, *supra* note 8, 86 FR at 53372–73. ''Regulatory Deficiency'' would be defined as ''the operation of the Company (in connection with matters that are not Non-Market Matters) or the BSTX Market (including, but not limited to, the BSTX System) in a manner that is not consistent with the Exchange Rules and/or the SEC Rules governing the BSTX Market or BSTX Participants, or that otherwise impedes the Exchange's ability to regulate the BSTX Market or BSTX Participants or to fulfill its obligations under the Exchange Act as an SRO.'' *See* BSTX LLC Agreement, Section 1.1. The Exchange states that the proposed provisions in Section 3.2(a) of the LLC Agreement are substantially the same as those in the Amended and Restated Limited Liability Company Agreement of BOX Options Market LLC, dated as of August 15, 2018, and help guarantee the Exchange's ability to fulfill its regulatory responsibilities and operate in a manner consistent with the Exchange Act, and in particular with Section 6(b)(1) of the Exchange Act. *See* OIP, *supra* note 8, 86 FR at 53373; *see also id.* at 53377 n.87 and accompanying text.

[40] *See* OIP, *supra* note 8, 86 FR at 53366.

[41] *See* BSTX LLC Agreement, Section 4.1(a); OIP, *supra* note 8, 86 FR at 53370, 53881. The Exchange proposes that only to the extent expressly provided for in the LLC Agreement and the Related Agreements, and as delegated by the Board to committees of the Board or to duly appointed Officers or agents of BSTX, neither a Member nor any other Person other than the Board of Directors shall be an agent of BSTX or have any right, power or authority to transact any business in the name of BSTX or to act for or on behalf of or to bind BSTX. *See* BSTX LLC Agreement, Section 4.9; OIP, *supra* note 8, 86 FR at 53370; Amendment No. 2, *supra* note 11, at 23–24. Members would have the right to vote on the admission of additional or substitute Members, the admission of a personal representative or successor in interest of a Member, and the dissolution and winding up of the BSTX. *See* BSTX LLC Agreement, Sections 7.1(b), 7.5, and 10.1(a)(iii); Amendment No. 2, *supra* note 11, at 7 n.14.

[42] The Exchange states that the one Member Director appointed by each of BOX Digital and tZERO would comprise a maximum of 20% of all Directors on BSTX's Board. *See* Amendment No. 2, *supra* note 11, at 70. A Member Director would not have more than 20% of the total voting power on any committee of the BSTX Board. *See* BSTX LLC Agreement, Section 4.2(c); Amendment No. 2, *supra* note 11, at 25 n.52.

[43] The Exchange proposes that for so long as BSTX is a facility of the Exchange, the Exchange will have the right to appoint a member of the senior management of the regulation staff of the Exchange to serve as Regulatory Director. *See* BSTX LLC Agreement, Section 4.1(a); OIP, *supra* note 8, 86 FR at 53370.

[44] The Exchange proposes that the Independent Director would be appointed by the affirmative vote

Continued

each of the Directors would be entitled to vote on any action to be taken by the Board.[45]

To help ensure that the Exchange has and will continue to have adequate funding to be able to meet its responsibilities under the Exchange Act, the Exchange represents that it would have adequate funding for the Exchange's operations with respect to BSTX, including the regulation of the Exchange.[46] The Exchange also states that the Facility Agreement would require BSTX to provide adequate funding to the Exchange's operations with respect to BSTX, including regulation of BSTX by the Exchange, and that prior to commencing operations as a facility of the Exchange, BSTX will have the necessary funds and assets, including furnishings, equipment, and servers, to adequately operate the BSTX facility until it begins receiving revenues from operations to operate BSTX as a facility of the Exchange.[47] Further, BSTX would not be entitled to any revenue generated from fines, fees, or penalties imposed on BSTX Participants with respect to trading on BSTX (''Regulatory Funds''). Any Regulatory Funds received by the Exchange will not be used for non-regulatory purposes, distributed to the Exchange's owners, or remitted to BSTX.[48]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[49] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Exchange Act,[50] which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act and to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules or regulations thereunder, and the rules of the exchange. The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(3) of the Exchange Act,[51] which, among other things, requires that the rules of an exchange ensure fair representation of its members in the selection of its directors and administration of its affairs. In addition, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Exchange Act,[52] which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

A. BSTX as a Facility of the Exchange

The proposed rule change is consistent with Section 6(b)(1) of the Exchange Act in that, upon establishing BSTX as a facility, the Exchange would remain so organized and have the capacity to carry out the purposes of the Exchange Act. As an SRO, the Exchange would have regulatory control over BSTX and would be responsible for ensuring BSTX's compliance with the federal securities laws and all applicable rules and regulations thereunder. Furthermore, BSTX would be obligated under the LLC Agreement to operate in a manner consistent with the regulatory and oversight responsibilities of the Exchange and the Exchange Act and the rules and regulations thereunder.[53] The Commission has previously approved similar structures with respect to the operation of exchange facilities.[54]

Although BSTX would not carry out any regulatory functions, all of its activities must be consistent with the Exchange Act. As a facility of a national securities exchange, BSTX would not be solely a commercial enterprise, but an integral part of an SRO that is registered pursuant to the Exchange Act and therefore subject to obligations imposed by the Exchange Act. The proposed LLC Agreement is reasonably designed to enable BSTX to operate in a manner consistent with this principle. The LLC Agreement would provide that BSTX and its Members, Officers, Directors, agents, and employees shall comply with the federal securities laws and the rules and regulations promulgated thereunder and cooperate with the Exchange and the Commission.[55] Further, BSTX's Members, Officers, Directors, agents, and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and shall not take actions which would interfere with the Exchange's regulatory functions or the Exchange's ability to carry out its responsibilities under the Exchange Act.[56] In addition, each Controlling Person[57] would be required to become a party to and abide by all the provisions of the LLC Agreement,[58] and

of a majority of the other Directors. *See* BSTX LLC Agreement, Section 4.1(a); Amendment No. 2, *supra* note 11, at 25.

[45] *See* BSTX LLC Agreement, Section 4.3; Amendment No. 2, *supra* note 11, at 27.

[46] *See* Amendment No. 2, *supra* note 11, at 37.

[47] *See id.* at 37–38.

[48] *See id.* at 38. Pursuant to the Facility Agreement, the Exchange would be entitled to receive all fees, fines and penalties imposed upon BSTX Participants with respect to the BSTX trading system, as well as market data fees, tape and other revenue including regulatory fees and trading fees, payable by BSTX Participants, as well as any funds received from any applicable market data fees, tape revenue, and other revenue. All such funds may be used by the Exchange for regulatory purposes, as determined solely by the Exchange, and any excess funds will be remitted to BSTX. *See id.* Further, any ''Regulatory Funds'' received by the Exchange will not be distributed to the Exchange's owners or used for non-regulatory purpose. *See id.* at 39 n.77 and accompanying text; *see also* BOX Exchange LLC Second Amended and Restated Limited Liability Company Agreement, dated November 30, 2020 (''Exchange LLC Agreement''), Sections 1.1, 8.1.

[49] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[50] 15 U.S.C. 78f(b)(1).

[51] 15 U.S.C. 78f(b)(3).

[52] 15 U.S.C. 78f(b)(5).

[53] *See* BSTX LLC Agreement, Section 4.11(b).

[54] *See, e.g.,* Securities Exchange Act Release Nos. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (order approving New York Block Exchange as a facility of the New York Stock Exchange); 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving CBOE Stock Exchange as a facility of the Chicago Board Options Exchange) (''CBSX Order''); 54399 (September 1, 2006), 71 FR 53728 (September 12, 2006) (order approving the ISE Stock Exchange as a facility of the International Securities Exchange) (''ISE Stock Order''); 54364 (August 25, 2006), 71 FR 52185 (September 1, 2006) (order approving the Boston Equities Exchange as a facility of the Boston Stock Exchange); and 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (order approving the Boston Options Exchange Regulation as a facility of the Boston Stock Exchange).

[55] *See* BSTX LLC Agreement, Section 4.11(b).

[56] *See id.* Section 4.11(a).

[57] ''Controlling Person'' would mean a Person who, alone or together with any Related Persons of such Person, holds a Controlling Interest in a Member. ''Controlling Interest'' would mean direct or indirect ownership of 25% or more of the total voting power of all equity securities of a Member (other than voting rights solely with respect to matters affecting the rights, preferences, or privileges of a particular class of equity securities), by any Person, alone or together with any Related Persons of such Person. *See id.* Section 7.4(h)(iv). The Exchange represents that the definitions of ''Controlling Person'' and ''Controlling Interest'' are the same as those that currently apply to BOX Holdings. *See* OIP, *supra* note 8, 86 FR at 53368.

[58] *See* BSTX LLC Agreement, Section 7.4(h)(i); OIP, *supra* note 8, 86 FR at 53368; Amendment No. 2, *supra* note 11, at 12–13. The Exchange states that BOX Digital's upstream owners (BOX Holdings, MX US 2, MX US 1, Inc. (''MX US 1''), Bourse de

thereby, like Members, commit to comply with the federal securities laws and the rules and regulations promulgated thereunder and to cooperate with the Exchange and the Commission,[59] to give due regard to the preservation of the independence of the self-regulatory function of the Exchange,[60] and to not take actions which would interfere with the regulatory functions of the Exchange or the Exchange's ability to carry out its responsibilities under the Exchange Act.[61] According to the Exchange, these provisions are designed to help maintain the independence of the Exchange's regulatory function.[62]

The proposed LLC Agreement would provide that all Confidential Information of BSTX or the Exchange pertaining to regulatory matters (including but not limited to disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of BSTX shall not be made available to any persons other than to those Officers, Directors, employees, and agents of BSTX that have a reasonable need to know the contents thereof; would be retained in confidence by BSTX and its Officers, Directors, employees, and agents; and would not be used for any non-regulatory purpose.[63] Nothing in the LLC Agreement, however, would limit or impede the rights of the Commission or the Exchange to access and examine Confidential Information of BSTX pursuant to the federal securities laws or limit or impede the ability of Directors, Officers, employees, or agents of BSTX to disclose confidential information to the Commission or the Exchange.[64]

The LLC Agreement would also provide that the Exchange will receive notice of planned or proposed changes to BSTX (excluding Non-Market Matters[65]) or the BSTX Market (including, but not limited to, the BSTX System) which would require an affirmative approval by the Exchange prior to implementation.[66] Also, the Exchange proposes that if the Exchange determines that the planned or proposed changes could cause BSTX or the BSTX Market to operate in a manner that is not consistent with the Exchange Act or the Exchange's rules or would otherwise impede the Exchange's ability to regulate the BSTX Market or BSTX Participants or to fulfill its obligations under the Exchange Act as an SRO (each a ''Regulatory Deficiency''), the Exchange may direct BSTX to modify the proposal as necessary to ensure that it does not cause a Regulatory Deficiency.[67] Likewise, if the Exchange determines that a Regulatory Deficiency exists or is planned, the Exchange could direct BSTX to undertake such modifications to BSTX or the BSTX Market as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow the Exchange to perform and fulfill its regulatory responsibilities.[68] Furthermore, the Exchange would review any amendment, modification, waiver or supplement to the LLC Agreement and if such amendment is required to be filed with, or filed with and approved by, the Commission before it may be effective, then such amendment would not be effective until filed with, or filed with and approved by, the Commission.[69]

Certain additional provisions in the LLC Agreement that make accommodation for the Exchange as the SRO for BSTX are consistent with the Exchange Act because they enhance the ability of the Exchange to carry out its self-regulatory responsibilities with respect to BSTX. The LLC Agreement would provide that the Board of Directors may suspend or terminate a Member's voting privileges or membership in BSTX if the Member is subject to Statutory Disqualification, violates a material provision of the LLC Agreement or any federal or state securities law, or such action is necessary or appropriate in the public interest or for the protection of investors.[70] Any Director appointed by the Member subject to sanction would be excluded from any vote to suspend or terminate such Member.[71] To reflect further that BSTX is not solely a commercial enterprise, the LLC Agreement would also provide that no person subject to a Statutory Disqualification shall serve as a Director or Officer of BSTX.[72]

The provisions discussed above, which are designed to help ensure the independence of the Exchange's regulatory function and facilitate the ability of the Exchange to carry out its regulatory responsibilities under, and operate in a manner consistent with, the Exchange Act, are appropriate and consistent with the requirements of the Exchange Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.[73]

B. Regulatory Jurisdiction Over BSTX, the LLC Members, and Controlling Persons

The terms of the proposed LLC Agreement clearly describe the Commission's and the Exchange's regulatory jurisdiction over BSTX and its Members. The LLC Agreement would provide that, to the extent related to the operation or administration of the Exchange or the BSTX Market, the books, records, premises, officers, directors, agents, and employees of BSTX and its Members shall be deemed

---

Montreal Inc. (''Bourse de Montreal''), and TMX) and tZERO's upstream owners (Medici, Medici GP, and Overstock) would be Controlling Persons and, prior to the commencement of operations of BSTX, would be required to become parties to the LLC Agreement and abide by its provisions to the same extent as Members. *See* OIP, *supra* note 8, 86 FR at 53368; Amendment No. 2, *supra* note 11, at 13–14. The Exchange also states that any future Controlling Person would also be subject to its requirements. *See* OIP, *supra* note 8, 86 FR at 53376–77; Amendment No. 2, *supra* note 11, at 51; *see also infra* note 112 and accompanying text (enumerating the current persons who would be Controlling Persons of BSTX at the commencement of operations).

[59] *See* BSTX LLC Agreement, Section 4.11(b).

[60] *See id.* Section 4.11(a).

[61] *See id.*

[62] *See* Amendment No. 2, *supra* note 11, at 72–73.

[63] *See* BSTX LLC Agreement, Section 15.6. The Exchange states that, in order to protect the confidential information of the Exchange, tZERO directors, officers, and employees will only receive confidential information of BSTX and the Exchange, including confidential information pertaining to regulatory matters of BSTX and the Exchange (including but not limited to disciplinary matters, trading data, trading practices and audit information), on a need-to-know basis as it relates to the technology services being provided or specific roles with respect to BSTX and the Exchange, and that they will be subject to confidentiality obligations with respect to any confidential information they receive in the course of performing their services, including regulatory information. The Exchange also states that tZERO employees providing technology services to BSTX or the Exchange will have offices physically separate from employees of BSTX and the Exchange. *See* Amendment No. 2, *supra* note 11, at 45–46.

[64] *See* BSTX LLC Agreement, Section 15.6; *see also* OIP, *supra* note 8, 86 FR at 53372; Amendment No. 2, *supra* note 11, at 57–58.

[65] Non-Market Matters would be defined as changes relating solely to one or more of the following: Marketing, administrative matters, personnel matters, social or team-building events, meetings of the Members, communication with the Members, finance, location and timing of Board meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the BSTX Market, and de minimis items. *See* BSTX LLC Agreement, Section 3.2(a)(ii).

[66] *See id.; see also* Amendment No. 2, *supra* note 11, at 34–35.

[67] *See* BSTX LLC Agreement, Section 3.2(a)(iii). *See also* Amendment No. 2, *supra* note 11, at 35.

[68] *See* BSTX LLC Agreement, Section 3.2(a)(iv).

[69] *See id.* Section 18.1; *see also* Amendment No. 2, *supra* note 11, at 62.

[70] *See* BSTX LLC Agreement, Section 5.8; *see also* Amendment No. 2, *supra* note 11, at 53.

[71] *See* BSTX LLC Agreement, Section 5.8.

[72] *See id.* Section 4.1(a), (b); Section 4.5; *see also* Amendment No. 2, *supra* note 11, at 24–25, 24 n.51.

[73] 15 U.S.C. 78f(b)(1).

to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of, and subject to oversight pursuant to, the Exchange Act.[74] The LLC Agreement would also provide that the books and records of BSTX and its Members shall be maintained in the United States and shall be subject at all times to inspection and copying by the Commission and the Exchange.[75] As discussed above, Controlling Persons would also be required to abide by the provisions of the LLC Agreement, including the books and records requirements of Section 11.1.[76]

Further, the LLC Agreement would provide that BSTX, its Members, and the officers, directors, agents, and employees of BSTX and its Members irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and the Exchange for purposes of any suit, action, or proceeding pursuant to U.S. federal securities laws and the rules and regulations thereunder arising out of, or relating to, activities of the Exchange and BSTX (except that such jurisdictions shall also include Delaware state courts for any such matter relating to the organization or internal affairs of BSTX) and waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claims that they are not personally subject to the jurisdiction of the U.S. federal courts, the Commission, the Exchange, or Delaware state courts, as applicable; that the suit, action, or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter may not be enforced in or by such courts or agency.[77] Moreover, BSTX, the Exchange, and each Member would be required to take such action as is necessary to ensure that BSTX's, the Exchange's, and such Member's officers, directors, and employees consent in writing to the application to them of the provisions in the LLC Agreement regarding books and records, regulatory obligations, and regulatory jurisdiction to the extent related to the operation or administration of the Exchange or the BSTX Market.[78] As discussed above, Controlling Persons must also abide by the provisions of the LLC Agreement, including the jurisdictional requirements of Section 18.6(b), as well as the requirement of Section 18.6(c) to take such action as is necessary to ensure that its officers, directors, and employees consent in writing to the application to them of certain provisions in the LLC Agreement to the extent related to the operation or administration of the Exchange or the BSTX Market.[79]

These provisions are consistent with the Exchange Act because they are reasonably designed to facilitate the Commission's and the Exchange's regulatory jurisdiction over BSTX and the BSTX Market. These provisions help facilitate the Commission's inspections of BSTX's books and records by deeming them to be the books and records of a national securities exchange. Further, these provisions specify that the Commission may exercise its authority under Section 19(h)(4) of the Exchange Act[80] with respect to the officers and directors of BSTX and its Members, because such officers and directors are deemed to be officers and directors of the Exchange. Finally, the LLC Agreement states that, to the extent that they are related to BSTX's business, the books and records of BSTX are subject to the Commission's examination authority under Section 17(b)(1) of the Exchange Act.[81]

Furthermore, even in the absence of these provisions, Section 20(a) of the Exchange Act[82] provides that any person with a controlling interest in BSTX would be jointly and severally liable with and to the same extent that BSTX is liable under any provision of the Exchange Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. Moreover, the Exchange is required to enforce compliance with these provisions, because they are "rules of the exchange" within the meaning of Section 3(a)(27) of the Exchange Act.[83] A failure on the part of the Exchange to enforce its rules could result in suspension or revocation of its registration, pursuant to Section 19(h)(1) of the Exchange Act.[84] Also, Section 20(e) of the Exchange Act[85] creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Exchange Act or rule thereunder. Further, Section 21C of the Exchange Act[86] authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Exchange Act through an act or omission that the person knew or should have known would contribute to the violation.

C. Voting and Ownership Limitations; Changes in Control of BSTX

The provisions in the LLC Agreement placing limits on the ownership of Economic Units and Voting Units as a result of certain ownership transactions and limits on ownership of Economic Units and Voting Units by BSTX Participants,[87] as well as other provisions in the LLC Agreement relating to changes in control of BSTX, are consistent with the Exchange Act. These limitations and provisions are

[74] *See* BSTX LLC Agreement, Section 11.1.

[75] *See id.*

[76] *See supra* note 58 and accompanying text.

[77] *See* BSTX LLC Agreement, Section 18.6(b).

[78] *See id.* Section 18.6(c); *see also* OIP, *supra* note 8, 86 FR at 53379; Amendment No. 2, *supra* note 11, at 61.

[79] *See supra* note 58 and accompanying text.

[80] 15 U.S.C. 78s(h)(4) (authorizing the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (1) Willfully violated any provision of the Exchange Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange).

[81] 15 U.S.C. 78q(b)(1).

[82] 15 U.S.C. 78t(a).

[83] 15 U.S.C. 78c(a)(27).

[84] 15 U.S.C. 78s(h)(1).

[85] 15 U.S.C. 78t(e).

[86] 15 U.S.C. 78u–3.

[87] These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. *See, e.g.,* Securities Exchange Act Release Nos. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (File No. 10–237) (order granting the registration of MEMX LLC) ("MEMX Order"); 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (File No. 10–222) (order granting the registration of Investors' Exchange, LLC); 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (File No. 10–234) (order granting registration of Long Term Stock Exchange, Inc.) ("LTSE Order"); 79543 (December 13, 2016), 81 FR 92901, 92903 (December 20, 2016) (File No. 10–227) (order granting registration of MIAX PEARL, LLC) ("MIAX Pearl Order"); 68341 (December 3, 2012), 77 FR 73065, 73067 (December 7, 2012) (File No. 10–207) (order granting the registration of Miami International Securities Exchange, LLC); 58375 (August 18, 2008), 73 FR 49498, 49501 (August 21, 2008) (File No. 10–182) (order granting the registration of BATS Exchange, Inc.); *see also* Securities Exchange Release Nos. 76998 (January 29, 2016), 81 FR 6066, 6069 (February 4, 2016) (File No. 10–221) (order granting exchange registration of ISE Mercury, LLC); 70050 (July 26, 2013), 78 FR 46622, 46624 (August 1, 2013) (File No. 10–209) (order granting the exchange registration of Topaz Exchange, LLC (n.k.a. Nasdaq GEMX, LLC; f.k.a. ISE Gemini, LLC); 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (SR–CBOE–2008–88) (Cboe demutualization order); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR–NSX–2006–03) (NSX demutualization order); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26) (CHX demutualization order); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73) (Phlx demutualization order). The Exchange states that Section 7.4 of the proposed LLC Agreement is substantially similar to provisions in the BOX Holdings LLC Agreement, subject to changes related to differences in BSTX's structure, or provisions in the Exchange LLC Agreement. *See* Amendment No. 2, *supra* note 11, at 53.

designed to prevent any owner of BSTX from exercising undue control over the operation of the Exchange and to help ensure that the Exchange is able to carry out its regulatory obligations under the Exchange Act.

As described above, the BSTX Market would be operated by BSTX, and BSTX would be a facility of the Exchange.[88] Ownership and voting interests in BSTX would be held by 11 Members, and the Exchange would not itself hold a voting or ownership interest.[89] Under the LLC Agreement, no event that would result in a Person,[90] together with its Related Persons,[91] owning directly or indirectly, of record or beneficially, an aggregate Economic Percentage Interest greater than 40% (''Economic Ownership Limit'') would be effective without both the approval of the Exchange and an effective rule filed pursuant to Section 19 of the Exchange Act.[92] Notwithstanding the foregoing, a BSTX Participant, together with its Related Persons, would not be permitted to own directly or indirectly, of record or beneficially, an aggregate Economic Percentage Interest greater than 20% (''BSTX Participant Economic Ownership Limit'').[93] With respect to Voting Units, no event that would result in a Person, together with its Related Persons, owning directly or indirectly, of record or beneficially, an aggregate Voting Percentage Interest greater than 20% (''Voting Ownership Limit'') would be effective without both the approval of the Exchange and an effective rule filed pursuant to Section 19 of the Exchange Act. No BSTX Participant, however, would be permitted to exceed this Voting Ownership Limit.[94] Additionally, the LLC Agreement would prohibit any Person from entering into any agreement, plan, or other arrangement with any other Person that would enable such Person, either alone or together with its Related Persons, to vote, possess the right to vote, or cause the voting of Voting Units in excess of the Voting Ownership Limit.[95] In addition to the approval of the Exchange and an effective rule filed pursuant to Section 19 of the Exchange Act, any waiver of the 40% Economic Ownership Limit or 20% Voting Ownership Limit would require the Exchange to make certain determinations.[96] As discussed above, the Exchange proposed to establish BSTX as a facility of the Exchange to operate the BSTX Market, and to adopt the LLC Agreement as the source of governance and operating authority for BSTX.[97] Additionally, the Exchange proposed that, upon adoption of the LLC Agreement, no person would hold more than a 40% Economic Percentage Interest or a 20% Voting Percentage Interest in BSTX,[98] and per the terms of the LLC Agreement, no person would be permitted to exceed a 40% Economic Percentage Interest or 20% Voting Percentage Interest in contravention of the Economic Ownership Limit or Voting Ownership Limit without the required waiver and an effective proposed rule change, each as would be required by Section 7.4 of the LLC Agreement.[99] Accordingly, pursuant to the Exchange's proposal, BSTX cannot commence operations as a facility of the Exchange until the proposed LLC Agreement is adopted, and the Economic Percentage Interest and Voting Percentage Interest of each of the Members does not exceed 40% and 20%, respectively.

The LLC Agreement also contains a provision designed to ensure that no

[88] *See supra* note 34 and accompanying text.

[89] *See supra* notes 28–30 and accompanying text.

[90] ''Person'' would be defined as any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof. *See* BSTX LLC Agreement, Section 1.1.

[91] ''Related Person'' would mean with respect to any Person: (A) Any Affiliate of such Person; (B) any other Person with which such first Person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of Units; (C) in the case of a Person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b–7 under the Exchange Act) or director of such Person and, in the case of a Person that is a partnership or limited liability company, any general partner, managing member or manager of such Person, as applicable; (D) in the case of any BSTX Participant who is at the same time a broker-dealer, any Person that is associated with the BSTX Participant (as determined using the definition of ''person associated with a member'' as defined under Section 3(a)(21) of the Exchange Act); (E) in the case of a Person that is a natural person and a BSTX Participant, any broker or dealer that is also a BSTX Participant with which such Person is associated; (F) in the case of a Person that is a natural person, any relative or spouse of such Person, or any relative of such spouse who has the same home as such Person or who is a director or officer of the Exchange or any of its parents or subsidiaries; (G) in the case of a Person that is an executive officer (as defined under Rule 3b–7 under the Exchange Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (H) in the case of a Person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. *See id.* ''Units'' would mean Economic Units and/or Voting Units. *See id.* ''Affiliate'' would mean with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term ''control'' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership. *See id.*

[92] *See id.* Section 7.4(f); *see also* Amendment No. 2, *supra* note 11, at 16–17.

[93] *See* BSTX LLC Agreement, Section 7.4(f).

[94] *See id.* Section 7.4(g). The Exchange states that owners of the Exchange that are also Exchange Facility Participants are similarly limited to a maximum of 20% economic ownership of the Exchange. *See* OIP, *supra* note 8, 86 FR at 53369, n.39 and accompanying text (citing to Exchange LLC Agreement, *supra* note 48, Section 7.3); Amendment No. 2, *supra* note 11, at 21 n.41 and accompanying text (citing to Exchange LLC Agreement, *supra* note 48, Section 7.3). The Exchange also represents that the existing ownership limits of 40% economic ownership for owners of the Exchange, and further limitation of 20% economic ownership for owners that are Exchange Facility Participants, and the general limitation of 20% voting power of the Exchange would remain unchanged, and that these existing ownership limits would help ensure the independence of the Exchange's regulatory oversight of BSTX and facilitate the ability of the Exchange to carry out its regulatory responsibilities and operate in a manner consistent with Section 6(b)(1) of the Exchange Act. *See* OIP, *supra* note 8, 86 FR at 53369. ''Exchange Facility Participant'' means a firm or organization (including a BSTX Participant) that is registered with the Exchange pursuant to the rules of the Exchange that constitute the ''rules of an exchange'' within the meaning of Section 3 of the Exchange Act for purposes of participating in trading on any Exchange Facility. *See* Exchange LLC Agreement, *supra* note 48, Section 1.1; Amendment No. 2, *supra* note 11, at 5 n.9. ''Exchange Facility'' means any facility of the Exchange as defined in Section 3 of the Exchange Act. *See* Exchange LLC Agreement, *supra* note 48, Section 1.1.

[95] *See* BSTX LLC Agreement, Section 7.4(g). A Member could also voluntarily impose a lower ownership or voting restriction on itself. *See id.* Sections 7.4(g), (f); *see also* Amendment No. 2, *supra* note 11, at 18–19.

[96] *See* BSTX LLC Agreement, Sections 7.4(g), (f). The required determinations would be that (A) such waiver will not impair the ability of the Exchange to carry out its functions and responsibilities under the Exchange Act and the rules and regulations thereunder, (B) such waiver is otherwise in the best interests of the Exchange and the Members of BSTX, (C) such waiver will not impair the ability of the Commission to enforce the Exchange Act and (D) if applicable, the transferee in such transfer and its Related Persons are not subject to a Statutory Disqualification. *See id.* The Commission has previously approved the rules of other exchanges that provide for the ability of the exchange or its facility to waive comparable ownership and voting limitations for non-members of the exchange. *See, e.g.,* MEMX Order, *supra* note 87, 85 FR at 27454; CBSX Order, *supra* note 54, 72 FR at 10578.

[97] *See supra* notes 13–15 and accompanying text.

[98] *See supra* note 30 and accompanying text (discussing the specific Economic Percentage Interest and Voting Percentage Interest to be held by each Member upon adoption of the proposed BSTX LLC Agreement pursuant to the proposed rule change).

[99] *See* BSTX LLC Agreement, Sections 7.4(g), (f). BSTX Participants, however, would not be eligible for a waiver of the applicable 20% BSTX Participant Economic Ownership Limit or the Voting Ownership Limit. *See id.*

owner of BSTX will exceed the Voting Ownership Limit. Specifically, with certain exceptions,[100] each Member would hold the number of Voting Units equal to the number of Economic Units held by such Member.[101] However, if any Member holds an Economic Percentage Interest in excess of the applicable Voting Ownership Limit, then the excess Voting Units held by such Member would be automatically reduced and redistributed among the remaining Members pro rata according to each such Member's respective Economic Percentage Interest (''Voting Units Adjustment''), so that the Member does not exceed the applicable limit.[102]

The LLC Agreement also contains other provisions that are designed to further safeguard the ownership and voting limitations described above, or are otherwise related to direct and indirect changes in control. Specifically, the LLC Agreement would require a Member to provide BSTX with written notice 14 days prior, and BSTX to provide the Exchange and the Commission with written notice ten days prior, to the closing date of any ownership transaction that would result in the Member's Economic Percentage Interest or a Voting Percentage Interest in BSTX, either alone or together with its Related Persons, meeting or crossing the 5%, 10%, or 15% thresholds.[103] In addition, any Person that, either alone or together with its Related Persons, owns, directly or indirectly, of record or beneficially, 5% or more of Voting Percentage Interest or Economic Percentage Interest would, immediately upon acquiring knowledge of its ownership, be required to give BSTX written notice of that ownership.[104] In addition to these notice requirements, the LLC Agreement would require that any transfer or other ownership transaction that results in the acquisition and holding by any Person, alone or together with its Related Persons, of an aggregate Voting Percentage Interest or Economic Percentage Interest level which meets or crosses the threshold level of 20% or any successive 5 percentage interest would be subject to the rule filing process of Section 19 of the Exchange Act.[105] Further, any ownership transaction that would be in contravention of these notification and filing provisions, or otherwise violate Article 7 of the LLC Agreement, would be void.[106]

Moreover, the LLC Agreement would provide that a Controlling Person, unless it does not directly or indirectly hold any interest in a Member, shall be required to execute an amendment to the BSTX LLC Agreement upon establishing a Controlling Interest in a Member that, alone or together with its Related Persons, holds an Economic Percentage Interest or Voting Percentage Interest in BSTX equal to or greater than 20%, and abide by the provisions of the BSTX LLC Agreement to the same extent as if they were a Member.[107] The LLC Agreement would further provide that the rights and privileges, including all voting rights, of the Member in whom a Controlling Interest is held would be suspended until the amendment has become effective pursuant to Section 19 of the Exchange Act or the Controlling Person no longer holds, directly or indirectly, a Controlling Interest in the Member.[108] According to the Exchange, as Controlling Persons of BSTX, Overstock, Medici, Medici GP,[109] BOX Holdings,[110] MX US 2, MX US 1, Bourse de Montreal, and TMX would be required to become parties to the BSTX LLC Agreement prior to commencement of operations of BSTX as a facility of the Exchange, by executing an instrument of accession,[111] and abide by its provisions to the same extent and as if they were Members.[112] The LLC Agreement also

[100] *See infra* note 102 and accompanying text.

[101] *See* BSTX LLC Agreement, Section 7.4(g)(i). Upon any change in the ownership of Economic Units for any reason, the Voting Units held by the Members would be recalculated simultaneously so that each Member holds the number of Voting Units equal to the number of Economic Units, subject to any automatic reallocation of Voting Units required by the Voting Units Adjustment (*see infra* note 102). *See* BSTX LLC Agreement, Section 7.4(g)(ii).

[102] *See* BSTX LLC Agreement, Section 7.4(g)(i). In calculating the Voting Units Adjustment, any applicable Voting Ownership Limit with respect to each Member would be observed and no Member would be permitted to hold Voting Units in excess of such Member's applicable Voting Ownership Limit. *See id.*

[103] *See id.* Section 7.4(e); OIP, *supra* note 8, 86 FR at 53369. The Exchange states that the provisions in proposed Section 7.4(e) are the same as those contained in Section 7.4(e) of the BOX Holdings LLC Agreement. *See* OIP, *supra* note 8, 86 FR at 53369 n.34.

[104] *See* BSTX LLC Agreement, Section 7.4(e). The notice would be required to state: (i) Such Person's full legal name; (ii) the number of Voting Units and Economic Units owned, directly or indirectly, of record or beneficially, by such Person together with such Person's Related Persons; and (iii) whether such Person has the power, directly or indirectly, to direct the management or policies of BSTX, whether through ownership of Voting Units, by contract or otherwise. *See id.*

[105] *See id.* Section 7.4(e).

[106] *See id.* Section 7.4(d).

[107] *See id.;* OIP, *supra* note 8, 86 FR at 53368 (stating that this proposed provision is the same as a BOX Holdings provision). The Exchange states that Related Persons that are otherwise Controlling Persons are not required to become parties to the LLC Agreement if they are only under common control of an upstream owner but are not in the upstream ownership chain above a BSTX owner because they will not have the ability to exert any control over BSTX. *See* OIP, *supra* note 8, 86 FR at 53368; *see also supra* notes 59–61, 79, and accompanying text (setting forth some of the provisions in the BSTX LLC Agreement to which Controlling Persons required to become parties to the BSTX LLC Agreement would be subject). Also, any additional or substitute Member of BSTX would be required to execute a counterpart to the LLC Agreement to evidence its acceptance of the terms and provisions of the LLC Agreement. *See* BSTX LLC Agreement, Section 7.1(b); *see also* Amendment No. 2, *supra* note 11, at 48.

[108] *See* BSTX LLC Agreement, Section 7.4(h)(iii).

[109] The Exchange states that membership interests in Medici GP are held by the following, each of which holds less than 25% of Medici GP: Carine Clark, Susannah Duke, Steve Glover, Brad Hintze, Jeff Kearl, Trevor Lund, Matt Mosman, Erika Nash, Zain Rizavi, Laura Summerhays, The Blake G Modersitzki 2020 Irrevocable Trust (affiliated with Blake G. Modersitzki), The Capitola Trust (affiliated with Chad Packard), The GP Investment Trust (affiliated with Chris Cooper), and The Oaxaca Dynasty Trust (affiliated with Ben Lambert). *See* OIP, *supra* note 8, 86 FR at 53368; Amendment No. 2, *supra* note 11, at 12.

[110] In addition to the direct owners of BOX Holdings identified above (*see supra* note 28), the Exchange states that UBS Americas Inc., JPMC Strategic Investments I Corporation, Wolverine Holdings, L.P., and Aragon Solutions Ltd. (''Aragon''), each hold less than a 5% outstanding units of BOX Holdings. *See* Amendment No. 2, *supra* note 11, at 9. The Exchange states that the current equity ownership and voting power of the direct owners of BOX Holdings are reflected in Securities Exchange Act Release No. 93778. *See id.* at 9 n.26. In Securities Exchange Act Release No. 93778, the Commission approved a proposed rule change related to changes in ownership of the Exchange and BOX Holdings. *See* Securities Exchange Act Release No. 93778 (December 14, 2021), 86 FR 72021 (December 20, 2021) (SR–BOX–2021–19). The Exchange also states that Will Easley owns Aragon and is a Director of BOX Holdings. *See* Amendment No. 2, *supra* note 11, at 8 n.20.

[111] Specifically, Exhibit 5B of the proposal contains instruments of accession that will be executed by all Controlling Persons prior, and as a condition, to commencement of operations of BSTX as a facility of the Exchange. Following commencement of operations as a facility of the Exchange, any new Controlling Person will be required to execute an amendment in substantially the same form, and the Controlling Person will agree to become a party to the LLC Agreement and abide by all of its provisions, to the same extent and as if they were Members. *See* Amendment No. 2, *supra* note 11, at 51.

[112] *See id.* at 13–14. As discussed above, BOX Digital and tZERO will each hold a 40% Economic Percentage Interest in BSTX. *See supra* notes 28–30 and accompanying text (discussing upstream ownership of BSTX). The Exchange states that Overstock owns 43% of tZERO directly and 99% of Medici, which owns 44% of tZERO, and that as a result, Overstock owns, directly or indirectly, more than 80% of tZERO, which will own 40% of the Economic Units and 20% of the Voting Units of BSTX. The Exchange states that as such, Overstock, Medici, and Medici GP will be required to become parties to BSTX's LLC Agreement by executing an instrument of accession and abide by its provisions, to the same extent and as if they were Members, because they are Controlling Persons of BSTX. In addition to the direct owners of tZERO identified above, the Exchange states that each of the following own less than 3% of the outstanding shares of tZERO: Todd Tobacco, Newer Ventures LLC, Schalk Steyn, Raj Karkara, Alec Wilkins, Dohi Ang, Brian Capuano, Trent Larson, Eric Fish, Kristen Anne Bagley, Kirstie Dougherty, SpeedRoute Technologies Inc., Tommy McSherry, Rob Collucci, John Gilchrist, John Paul DeVito,

provides that any amendment to the LLC Agreement caused by the addition of a Controlling Person is subject to the rule filing requirements of Section 19(b) of the Exchange Act.[113] Thus, the addition of any future Controlling Person as a party to the LLC Agreement would be subject to the rule filing requirements of Section 19(b) of the Exchange Act.[114]

A proposed rule change submitted in any of the circumstances noted above would afford the Commission an opportunity to evaluate whether a change to the LLC Agreement, or a change in the ownership of BSTX, would be consistent with the Exchange Act, including whether the Commission and the Exchange would retain sufficient regulatory jurisdiction over the proposed indirect controlling party. The LLC Agreement would apply to any ultimate parent of BSTX, no matter how many levels of ownership are involved, provided that a Controlling Interest meeting the required threshold exists at each such level.

Although BSTX is not independently responsible for regulation, its activities with respect to the operation of BSTX must be consistent with, and not interfere with, the self-regulatory obligations of the Exchange. The proposed requirements in the LLC Agreement applicable to direct and indirect changes in control of BSTX described above, including the Economic Ownership Limit and Voting Ownership Limit imposed on Economic and Voting Unit transactions, as well as the Economic Ownership Limit and BSTX Participant Voting Limit imposed on owners of BSTX who are also BSTX Participants, are appropriate to help ensure that the Exchange is able to effectively carry out its self-regulatory responsibilities, including with respect to BSTX, and are consistent with the requirements of the Exchange Act. These limitations are also designed to help prevent any owner of BSTX from exercising undue control over the operation of the Exchange and to help assure that the Exchange is able to effectively carry out its regulatory obligations under the Exchange Act. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in a facility of the exchange. As the Commission has stated in the past, a member's interest in an exchange or a facility thereof could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.[115] A member that is a controlling shareholder of an exchange or its facility could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions.[116] As such, these requirements are expected to minimize the potential that a person or entity can improperly interfere with or restrict the ability of the Exchange to effectively carry out its regulatory oversight responsibilities under the Exchange Act.

BSTX's proposed governance provisions are consistent with the Exchange Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.[117] In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

D. Fair Representation of BSTX Participants

The Exchange's governance provisions are designed to provide fair representation of members in the selection of directors and the administration of the Exchange and are consistent with the Exchange Act. The Exchange states that it previously proposed structural changes to the Exchange to accommodate regulation of BSTX, in addition to the Exchange's existing facility (*i.e.,* BOX Options), which the Commission approved,[118] and that, pursuant to the proposed rule change the Commission is approving today, with the addition of BSTX as a facility of the Exchange, BSTX Participants would have the same representation, rights, and responsibilities as the Exchange's other Exchange Facility Participants.[119]

The Exchange currently operates one facility, BOX Options,[120] and there are provisions in the Exchange LLC Agreement and the Exchange Bylaws (together the ''Exchange Governing Documents'') that provide for the fair representation of Exchange members in the selection of directors and the administration of the Exchange that the Commission has previously found to be consistent with the Exchange Act, and in particular Section 6(b)(3) of the Exchange Act,[121] which, among other things, requires that the rules of an exchange ensure fair representation of its members in the selection of its directors and administration of its affairs.[122] Previously, because the Exchange regulated only one facility, the provisions in the Exchange Governing Documents providing for the fair representation of Exchange members were specifically applicable to BOX Options and to BOX Options

Jimmy Ambrose, Jason Heckler, Max Melmed, Alex Vlastakis, Olalekan Abebefe, Samson Arubuola, Ryan Mitchell, Zachary Wilezol, Anthony Bove, Ralph Daiuto, Rob Christiansen, Amanda Gervase, Derek Tobacco, Steve Bailey, and Dinosaur Financial. The Exchange also states that BOX Holdings, MX US 2, MX US 1, Bourse de Montreal, and TMX will each be required to become parties to the LLC Agreement by executing an instrument of accession and abide by its provisions to the same extent and as if they were Members because they are Controlling Persons of BSTX. The Exchange states that TMX owns 100% of Bourse de Montreal, which owns 100% of MX US 1, which owns 100% of MX US 2, which owns more than 40% of BOX Holdings, and that BOX Holdings owns 98% of BOX Digital, which will own 40% of the Economic Units and 20% of the Voting Units of BSTX. *See* Amendment No. 2, *supra* note 11, at 11–14. The Exchange represents that there are no other ''Controlling Persons'' that would be required to become parties to the LLC Agreement prior to the commencement of operations of BSTX. *See id.* at 14.

[113] *See* BSTX LLC Agreement, Section 7.4(h)(iii). The Exchange states that the amendment will be in substantially the form of the instruments of accession filed by the Exchange as Exhibit 5B to the proposal and subject to the rule filing process pursuant to Section 19 of the Exchange Act. *See* Amendment No. 2, *supra* note 11, at 51.

[114] The Exchange states that it will implement policies and procedures, including annual attestations by Members, to ensure potential direct and indirect owners of BSTX are required to provide any required notice to BSTX or to take other actions, such as executing an amendment to the LLC Agreement upon establishing a Controlling Interest, if applicable, and to monitor compliance with the proposed provisions related to changes in ownership and control. *See* Amendment No. 2, *supra* note 11, at 52.

[115] *See, e.g.,* MEMX Order, *supra* note 87, 85 FR at 27455; LTSE Order, *supra* note 87, 84 FR at 21845; MIAX PEARL Order, *supra* note 87, 81 FR at 92906; and Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014, 5018 (January 28, 2009) (SR–NYSE–2008–120) (order approving a proposed rule change relating to the Limited Liability Company Agreement of the New York Block Exchange, a facility of NYSE) (''NYBX Order'').

[116] *See, e.g.,* MEMX Order, *supra* note 87, 85 FR at 27455; ISE Stock Order, *supra* note 54, 71 FR at 53735.

[117] 15 U.S.C. 78f(b)(1).

[118] *See* OIP, *supra* note 8, 86 FR at 53366 n.13 and accompanying text (citing BOX–2020–04 Approval, *supra* note 34); *see also* Bylaws of BOX Exchange LLC (''Exchange Bylaws'').

[119] *See* OIP, *supra* note 8, 86 FR at 53366; Amendment No. 2, *supra* note 11, at 14.

[120] *See supra* note 34.

[121] *See, e.g.,* Securities Exchange Act Release No. 66871 (April 27, 2012), 86 FR 26323, 26325 (May 3, 2012) (''BOX Form 1 Approval''); BOX–2020–04 Approval, *supra* note 34, 85 FR at 32085–86.

[122] 15 U.S.C. 78(b)(3).

Participants.[123] The Exchange subsequently amended those provisions to accommodate the Exchange's regulation of multiple facilities.[124] The Exchange states that, with the Multiple Facilities Filing, it introduced structural changes to the Exchange to accommodate regulation of BSTX in addition to the Exchange's existing facility.[125] For example and among other changes, with the Multiple Facilities Filing, the Exchange replaced certain references in the Exchange Governing Documents to BOX Options with the term ''Exchange Facility,'' and to BOX Options Participant with the term ''Exchange Facility Participant.'' [126] The Commission found the provisions in the Exchange Governing Documents consistent with the Exchange Act as they applied to the Exchange's existing facility—BOX Options.[127] In particular, the Commission found the Exchange Governing Document provisions to be consistent with Sections 6(b)(1), (3), and (5) of the Exchange Act.[128]

The requirements in the Exchange Governing Documents as they would now also apply to the representation of BSTX as an ''Exchange Facility,'' and to BSTX Participants as ''Exchange Facility Participants,'' are consistent with the Exchange Act. For example, the requirement in the Exchange Bylaws that at least 20% of the directors of the Exchange shall be ''Participant Directors,'' [129] and that at least one Participant Director shall be selected from among the Exchange Facility Participants of each existing Exchange Facility,[130] and the means by which they will be chosen,[131] provide for the fair representation of BSTX Participants in the selection of directors and the administration of the Exchange, consistent with the Exchange Act, and in particular with Section 6(b)(3) of the Exchange Act.[132] As the Commission has previously stated, these requirements help to ensure that members of the Exchange have a voice in the use of self-regulatory authority, and that the exchange is administered in a way that is equitable to all those who trade on its markets or through its facilities.[133]

As discussed above, the Commission also found the Exchange's amendments to the Exchange Governing Documents to provide for direct representation of the Exchange's facility (BOX Options) on the Exchange Board and its Nominating Committee to be consistent with the Exchange Act.[134] The Exchange believes that the provisions in the Exchange Bylaws that a Facility Director [135] representing BSTX would serve on the Exchange Board [136] and that a Facility Representative [137] would serve on the Exchange Nominating Committee [138] provide additional protection for both BSTX and BSTX Participants, and help to ensure that BSTX and BSTX Participants have a voice in the use of self-regulatory authority and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.[139] The Commission previously stated, in the context of the Exchange's existing facility, that changes to these provisions provide mechanisms whereby a facility of the Exchange would have direct representation on the Exchange Board and are appropriate and consistent with the Exchange Act.[140] The Commission finds that these provisions would similarly provide a mechanism whereby BSTX as a facility of the Exchange, like BOX Options, would have representation on the Exchange Board and are appropriate and consistent with the Exchange Act.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[123] *See generally* BOX Form 1 Approval, *supra* note 121, 77 FR at 26325; BOX–2020–04 Approval, *supra* note 34. A ''BOX Options Participant'' is an Exchange Facility Participant that is registered with the Exchange pursuant to the Exchange Rules for purposes of participating in trading on the BOX Options Market. *See* BOX Holdings LLC Agreement, Section 1.1; Amendment No. 2, *supra* note 11, at 10, n.29.

[124] *See* BOX–2020–04 Approval, *supra* note 34; *see also supra* note 118 and accompanying text.

[125] *See* OIP, *supra* note 8, 86 FR at 53366.

[126] *See* BOX–2020–04 Approval, *supra* note 34, 85 FR at 32085.

[127] *See id.* at 32086.

[128] *See id.* at 32085–86.

[129] ''Participant Director'' means an Exchange Director who (i) has no material business relationship with the Exchange or any Affiliate of the Exchange, or any Exchange Facility Participant or any Affiliate of any Exchange Facility Participant and (ii) is not associated with any broker or dealer as required pursuant to Section 6(b)(3) of the Exchange Act, as amended; provided, however, that an individual who otherwise qualifies as a Public Director shall not be disqualified from serving in such capacity solely because such individual is a Director of the Exchange and/or the Chairman or Vice Chairman of the Exchange. *See* Exchange Bylaws, Section 1.01(w).

[130] *See id.* Section 4.02.

[131] *See id.* Section 4.06.

[132] 15 U.S.C. 78(b)(3). Among other things, these provisions provide that the Nominating Committee of the Exchange shall be composed of at least five members, and that at least twenty percent (20%) of the members of the Nominating Committee shall be Participant Representatives and at least one Participant Representative shall be selected from among the Exchange Facility Participants of each then existing Exchange Facility. *See* Exchange Bylaws, Section 4.06(a). ''Participant Representative'' means an officer, director or employee of an Exchange Facility Participant. *See id.* Section 1.01(v). The Exchange states that, under the Exchange Bylaws, as soon as practicable after the commencement of operations of BSTX as a new facility of the Exchange, a Participant Director, Participant Representative, Facility Director (defined further below), and Facility Representative (defined further below) will be appointed by the Exchange Board from among the eligible individuals with respect to the BSTX facility and that such individuals shall serve in their respective capacities until the first annual meeting of the Exchange members following appointment, when the regular selection processes shall govern. *See* OIP, *supra* note 8, 86 FR at 53380 (citing Exchange Bylaws, Section 4.02). As Exchange Facility Participants, and as is the case with respect to the Exchange's existing facility, BOX Options, BSTX Participants will also be entitled to representation on certain other committees of the Exchange, such as the Exchange's Hearing Committee. For example, the Exchange's Hearing Committee or any panel thereof shall include at least one Participant Representative and shall have exclusive jurisdiction to conduct hearings on disciplinary proceedings brought by the Exchange against any Exchange Facility Participant, or any Person employed by or associated with any Exchange Facility Participant for any alleged violation of the Exchange Act, the rules and regulations thereunder, the Exchange Bylaws or Exchange Rules, or the interpretations and stated policies of the Exchange Board. *See* Exchange Bylaws, Section 6.08(a); *see also* OIP, *supra* note 8, 86 FR at 53380 (stating that the Exchange's Hearing Committee includes Exchange Facility Participants, which could include one or more BSTX Participants). The Exchange's Executive Committee, if appointed and with certain exceptions, may exercise all the powers and authority of the Exchange Board in the management of the business and affairs of the Exchange. Pursuant to the Exchange Bylaws, at least 20% of the members of the Executive Committee shall be Participant Directors and at least one Participant Director shall be selected from among the Exchange Facility Participants of each then existing Exchange Facility. *See* Exchange Bylaws, Section 6.04; *see also* Amendment No. 2, *supra* note 11, at 63–64.

[133] *See* BOX Form 1 Approval, *supra* note 121, 86 FR at 26325.

[134] *See supra* note 128.

[135] ''Facility Director'' means a Director who is a director or senior executive officer of an Exchange Facility. *See* Exchange Bylaws, Section 1.01(j).

[136] A number of directors equal to the number of Exchange Facilities shall be Facility Directors and one such Facility Director shall be selected by each Exchange Facility. *See id.* Section 4.02.

[137] ''Facility Representative'' means a member of the Nominating Committee who is a director or senior executive officer of an Exchange Facility. *See id.* Section 1.01(j).

[138] One member of the Nominating Committee with respect to each Exchange Facility shall be the Facility Representative selected by such Exchange Facility. *See id.* Section 4.06(a).

[139] *See* OIP, *supra* note 8, 86 FR at 53380.

[140] *See* BOX–2020–04 Approval, *supra* note 34, 85 FR at 32086.

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2021–14 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2021–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2021–14, and should be submitted on or before March 17, 2022.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the **Federal Register**. The Commission notes that the original proposal and the proposal as modified by Amendment No. 1 were published for comment in the **Federal Register**.[141]

In Amendment No. 2, the Exchange amended the proposal to: (1) Introduce certain defined terms, including ''Shortfall Amount,'' ''Statutory Disqualification,'' and ''Tax Matters Representative,'' (2) convert existing class A and class B units of BSTX to Economic Units and Voting Units of BSTX, (3) remove the requirement that the BSTX Board will appoint an Audit Committee and a Compensation Committee,[142] (4) specify the individuals and entities that own economic and voting interests in BSTX and at what levels, including that BOX Digital and tZERO's economic interests have been reduced to 40% each and that BOX Digital and tZERO's voting interests have been reduced to 20% each, (5) revise Exhibit 5B to propose the form of Instrument of Accession that each identified Controlling Person would sign, and (6) make other technical, clarifying and conforming changes. These changes help to clarify the proposal by providing additional specificity regarding how and by whom ownership and voting interests in BSTX are held, the structure and operation of the BSTX Board, and which persons will be required to comply with the LLC Agreement.

In addition, the Exchange made several changes to bring the proposed rules into closer alignment with the rules establishing the governance structure of other national securities exchanges, including by: (1) Prohibiting events that would result in any Person, together with its Related Persons, holding an Economic Percentage Interest in BSTX greater than 40% or a Voting Percentage Interest in BSTX greater than 20% without both Exchange approval and an effective rule filed pursuant to Section 19 of the Exchange Act, (2) prohibiting BSTX Participants from holding either an Economic Percentage Interest or Voting Percentage Interest in BSTX greater than 20%, (3) providing that no person subject to a Statutory Disqualification will serve as a Director or Officer of BSTX, and (4) representing that the Exchange will have adequate funding for the Exchange's operations with respect to BSTX. These changes help make these aspects of the proposal substantially similar to the existing rules of national securities exchanges. In addition, the Exchange modified the structure and composition of the BSTX Board by limiting BOX Digital and tZERO to one Member Director each, providing the Regulatory Director with voting rights, adding the BSTX CEO as a Director, and providing that the Independent Director will serve as chairman of the BSTX Board. These changes enhance the ability of the Exchange to carry out its regulatory oversight of BSTX by limiting the ability of Members of BSTX to control the BSTX Board.

For these reasons, the changes and additional information in Amendment No. 2 assist the Commission in finding that the proposal is consistent with the Exchange Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[143] to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[144] that the proposed rule change (SR–BOX–2021–14), as modified by Amendment No. 2 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[145]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03873 Filed 2–23–22; 8:45 am]

BILLING CODE 8011–01–P

[141] *See* Notice, *supra* note 3; OIP, *supra* note 8.

[142] The Commission notes that this configuration is similar to other rule filings the Commission has approved. *See, e.g.,* NYBX Order, *supra* note 115; ISE Stock Order, *supra* note 54.

[143] 15 U.S.C. 78f(b)(2).

[144] 15 U.S.C. 78s(b)(2).

[145] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94271; File No. SR–FICC–2022–001]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Clearing Agency Model Risk Management Framework

February 17, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 11, 2022, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. FICC filed the proposed rule change pursuant to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Clearing Agency Model Risk Management Framework (''Framework'') of FICC and its affiliates, The Depository Trust Company (''DTC'') and National Securities Clearing Corporation (''NSCC,'' and together with FICC, the ''CCPs,'' and the CCPs together with DTC, the ''Clearing Agencies'').[5] The Framework has been adopted by the Clearing Agencies to support their compliance with Rule 17Ad–22(e) (the ''Covered Clearing Agency Standards'') under the Act,[6] and, in this regard, applies solely to models [7] utilized by the Clearing Agencies that are subject to the model risk management requirements set forth in Rules 17Ad–22(e)(4), (e)(6), and (e)(7) under the Act.[8]

The proposed rule change would amend the Framework [9] to (i) harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework; (ii) provide that provisional approvals of models may be extended if approved by the Managing Director of Model Risk Management (''MRM'') and notice thereof is given to the Group Chief Risk Officer; however, in no event shall any provisional approval, together with any extension(s) granted, exceed one year and (iii) make other technical and clarifying changes to the text, as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Framework to (i) harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework; (ii) provide that provisional approvals of models may be extended if approved by the Managing Director of MRM and notice thereof is given to the Group Chief Risk Officer; however, in no event shall any provisional approval, together with any extension(s) granted, exceed one year and (iii) make other technical and clarifying changes to the text, as described below.

Background

The Covered Clearing Agency Standards require that the Clearing Agencies take steps to manage the models that they employ in identifying, measuring, monitoring, and managing their respective credit exposures and liquidity risks, including that the Clearing Agencies conduct daily backtesting of model performance, periodic sensitivity analyses of models, and annual validation of models.[10] The Framework is maintained by the Clearing Agencies to support their compliance with the requirements of the Covered Clearing Agency Standards relating to model risk management.

The Framework outlines the applicable regulatory requirements mentioned above, describes the risks that the Clearing Agencies' model risk management program are designed to mitigate, and sets forth specific model risk management practices and requirements adopted by the Clearing Agencies to ensure compliance with the Covered Clearing Agency Standards. These practices and requirements include, among other things, the maintenance of a model inventory (''Model Inventory''), a process for rating model materiality and complexity, processes for performing model validations and resolving findings identified during model validation, and processes for model performance monitoring, including backtesting and sensitivity analyses. The Framework also describes applicable internal ownership and governance requirements.[11]

The proposed rule change would harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework. The proposed rule change would also amend the Framework to provide the Clearing Agencies with the ability to make limited time extensions for

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The Framework sets forth the model risk management practices that the Clearing Agencies follow to identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The Framework is filed as a rule of the Clearing Agencies. *See* Securities Exchange Act Release Nos. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File Nos. SR–DTC–2017–008, SR–FICC–2017–014, SR–NSCC–2017–008) (''2017 Notice''); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (File Nos. SR–DTC–2020–008, SR–FICC–2020–004, SR–NSCC–2020–008); and 92379 (July 13, 2021), 86 FR 38143 (July 19, 2021) (File No. SR–DTC–2021–013), 92381 (July 13, 2021), 86 FR 38163 (July 19, 2021) (File No. SR–NSCC–2021–008), and 92380 (July 13, 2021), 86 FR 38140 (July 19, 2021) (File No. SR–FICC–2021–006) (collectively, the ''MRMF Filings'').

[6] 17 CFR 240.17Ad–22(e). Each of DTC, NSCC and FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with Rule 17Ad–22(e).

[7] Pursuant to Section 3.1 of the Framework, the Clearing Agencies have adopted the following definition of ''model'': ''[M]odel'' refers to a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates. A ''model'' consists of three components: (i) An information input component, which delivers assumptions and data to the model; (ii) a processing component, which transforms inputs into estimates; and (iii) a reporting component, which translates the estimates into useful business information. The definition of model also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature. *See* 2017 Notice, *supra* note 5. *See also* Supervisory Guidance on Model Risk Management, SR Letter 11–7 Attachment, dated April 4, 2011, issued by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, *available at https://www.federalreserve.gov/supervisionreg/srletters/sr1107a1.pdf,* page 3.

[8] 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC because DTC is not a central counterparty.

[9] Amending the Framework does not require any changes to the Rules, By-Laws and Organization Certificate of DTC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf*) (the ''DTC Rules''), the Rulebook of the Government Securities Division of FICC (*available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf*) (the ''GSD Rules''), the Clearing Rules of the Mortgage-Backed Securities Division of FICC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf*) (the ''MBSD Rules''), or the Rules & Procedures of NSCC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf*) (the ''NSCC Rules,'' and collectively with the DTC Rules, GSD Rules, and MBSD Rules, the ''Rules''), because the Framework is a standalone document. *See* MRMF Filings, *supra* note 5.

[10] *See* 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[11] *See* MRMF Filings, *supra* note 5, for additional information on the contents of the Framework.

provisional approvals of models. In this regard, the proposed rule change is designed to facilitate the Clearing Agencies' ability to prudently manage contingencies relating to events or changes of circumstance that may impact the Clearing Agencies' management of credit risk, margin, and liquidity risk management models, in accordance with the Framework. Additionally, the proposed rule change would make technical and clarifying changes to the text of the Framework, as described below.

Proposed Rule Change

Eliminate References to ''Full'' Model Validation

With respect to model validation, the Covered Clearing Agency Standards refer to the term simply as ''model validation,'' as defined by Rule 17Ad–22(a)(9) under the Act.[12] However, the Framework refers to model validation both as a ''full model validation'' and ''model validation,'' and as an undefined and defined term depending on usage. For example, Section 1 (Executive Summary) of the Framework describes Section 3 (Model Risk Management Framework), among other things, as including a discussion on ''full model validation.'' Yet, ''Model Validation'' is first defined in Section 3 as the definition used by the Covered Clearing Agency Standards, which does not use the modifier ''full.'' Moreover, references to full model validation and model validation in the Framework have the same meaning, as the Framework does not distinguish between the two.

To address these unnecessary variations, the Clearing Agencies propose to harmonize the terminology used in the Framework relating to model validation, with the applicable term used in the Covered Clearing Agency Standards, by deleting ''full'' in all instances where it appears as a modifier to ''model validation'' in the Framework. In this regard, the word ''full'' preceding ''model validation'' would be deleted from the Framework in all instances where it appears, including (i) from the reference in Section 1 of the Framework, mentioned above, (ii) renaming Section 3.3 of the Framework, named Full Model Validation, as ''Model Validation,'' and (iii) deleting four appearances of the word ''full'' before ''Model Validation'' in the text of Section 3.

Extension of Provisional Approvals of Models

The Covered Clearing Agency Standards require that the Clearing Agencies identify, measure, monitor, and manage their respective credit exposures and liquidity risks by performing model validations of their respective credit risk and liquidity risk models not less than annually or more frequently as may be contemplated by the applicable Clearing Agency's established risk management framework.[13] A covered clearing agency that is a central counterparty must perform a model validation for its margin system and related models not less than annually or more frequently as may be contemplated by such central counterparty's risk management framework.[14]

Section 3.6 of the Framework (Model Approval and Control) provides that new models, and material changes to existing models, shall undergo model validation by MRM and then be approved by MRM prior to business use.

In the absence of a Model Validation, provisional approvals with respect to new models and material changes to existing models may be issued to allow a model to be used for urgent business purposes prior to the completion of MRM's Model Validation. Such provisional approval requests must be presented by the applicable Model Owner [15] to MRM, which may provisionally approve the model for a limited period not to exceed six months.

The Framework does not provide for extensions of this six-month provisional approval period. However, MRM has observed, over time and since the Framework was initially filed,[16] that it could take longer than six months to complete a model validation in accordance with the timeframe set forth in Section 3.3 of the Framework. For example, a model that has been provisionally approved and put into use while undergoing further modification and/or enhancement by a third-party developer, cannot undergo validation by MRM until such time as the developer has completed its process and made the enhanced model available to the Clearing Agencies. Considering the amount of time it may take for the developer to complete and deliver the modification and/or enhancement to the Clearing Agencies, as well as MRM's validation process itself, it may be necessary for the model to operate under provisional approval for a period greater than six months.

Therefore, pursuant to the proposed rule change, the Clearing Agencies would amend Section 3.6 of the Framework to provide that provisional approvals of models may be extended if approved by the Managing Director of MRM and notice thereof is given to the Group Chief Risk Officer; however, in accordance with the Covered Clearing Agency Standards requirements that credit, liquidity and margin models, as applicable, be validated at least annually,[17] in no event shall any provisional approval, together with any extension(s) granted, exceed one year. In this regard, the proposed rule change would accommodate the incorporation of any modifications and enhancements identified by a developer into a provisionally approved model prior to model validation, and still allow the model validation to be completed within a timeframe that would be consistent with the requirements of both the Framework and the Covered Clearing Agency Standards.

Technical and Clarifying Changes

Section 1 (Executive Summary)

A sentence in Footnote 8 under Section 1 (Executive Summary) of the Framework would be revised for clarity and grammatical usage. The footnote describes the Model Risk Tolerance Statement and the Market Risk Tolerance Statement, which are listed in Section 1 among a series of documents used by the Clearing Agencies to support their execution of the Framework. In describing the Market Risk Tolerance Statement, the footnote states: ''. . . the Market Risk Tolerance Statement, which articulates, among other things, risk tolerance levels covering margin backtests covering backtest coverage and stress tests covering exposure to extreme market moves.'' The proposed rule change would eliminate certain repetitive usage of ''covering'' and ''coverage'' in the text quoted above such that the applicable text would read as follows: ''. . . the Market Risk Tolerance Statement, which articulates, among other things, risk tolerance levels covering margin

[12] The term ''model validation'' means an evaluation of the performance of each material risk management model used by a covered clearing agency (and the related parameters and assumptions associated with such models), including initial margin models, liquidity risk models, and models used to generate clearing or guaranty fund requirements, performed by a qualified person who is free from influence from the persons responsible for the development or operation of the models or policies being validated. 17 CFR 240.17Ad–22(a)(9).

[13] *See* 17 CFR 240.17Ad–22(e)(4)(vii) and (e)(7)(vii).

[14] *See* 17 CFR 240.17Ad–22(e)(6)(vii).

[15] Pursuant to Section 3.1 of the Framework, the ''Model Owner'' is the person designated by the applicable business area or support function to be responsible for a particular model. The Model Owner is recorded in the Model Inventory.

[16] *Supra* note 5.

[17] *See* 17 CFR 240.17Ad–22(e)(4)(vii), (e)(6)(vii) and (e)(7)(vii).

backtests and stress tests related to exposure to extreme market moves.''

Section 2 (Model Risk Management Requirements)

The first paragraph of Section 2 is intended by the Clearing Agencies to describe that in compliance with Rules 17Ad–22(e)(4)(vii),[18] and (e)(7)(vii)[19] of the Covered Clearing Agency Standards, each Clearing Agency is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to perform model validations on its credit risk models and liquidity risk models not less than annually or more frequently as may be contemplated by the Clearing Agency's risk management framework established pursuant to Rule 17Ad–22(e)(3).[20] The main text of the paragraph contains typographical errors, in that in place of the reference to section (e) in each of the three rules citied in the paragraph, it instead includes an erroneous reference to a section (C). However, the footnotes to these references contain the correct citations. The Clearing Agencies would revise the main text of the paragraph to correct the erroneous references to section (C) to instead refer to section (e).

Section 3.1 (Model Inventory)

Section 3.1 (Model Inventory) (i) sets forth the definition of model adopted by the Clearing Agencies,[21] (ii) defines MRM as responsible for model risk management as a second-line function that is charged with determining whether any proposed method, system, or approach designed for Clearing Agency use meets the definition of model, (iii) provides a definition of Model Inventory as the definitive list of models subject to the Framework, (iv) describes a model inventory survey that is conducted at least annually across the Clearing Agencies to confirm that the Model Inventory is current, and (v) describes that all models subject to the Framework are validated, as described in the Framework.

The proposed rule change would make technical and clarifying changes to the second paragraph of this section, which states:

> The Model unit within the Group Chief Risk Office that is responsible for model risk management as a second-line function (''MRM'') is charged with determining whether any proposed method, system, or approach designed for Clearing Agency use meets the above definition. All models subject to this Framework will be added to the definitive list of models (''Model Inventory'') and tracked by MRM. A Model Inventory Survey is conducted at least annually across the Clearing Agencies to confirm the Model Inventory is current (''Annual Model Inventory Survey''). During the Annual Model Inventory Survey, any business area or support function intending to have a model developed for Clearing Agency use will submit materials relevant to such proposed model for MRM to review and assess whether such proposed model will be added to the Model Inventory. The person designated by the applicable business area or support function to be responsible for a particular model (''Model Owner'') is recorded as the Model Owner for such model by MRM in the Model Inventory.

First, for enhanced clarity, the first sentence of the paragraph would be revised to replace the initial reference to ''The Model'' with ''Model Risk Management'' and define the term as ''MRM'' directly after it is mentioned, rather than after additional descriptive text that follows in the sentence. The proposed rule change would also eliminate the reference to MRM as a ''unit'' because this reference is redundant given the context describing the functionality of MRM implies that it is a unit or group. Conforming grammatical changes would also be made to delete ''that'' after ''Group Chief Risk Office'' and add ''and'' after ''second-line function.'' The third sentence of the paragraph would be revised to make the initial letters in the words ''Model Inventory Survey'' lower case (*i.e.,* ''model inventory survey'') as the term is not defined, but rather the reference is part of the description of the defined term ''Annual Model Inventory Survey'' that appears at the end of the sentence. The fourth sentence of the paragraph would be revised for consistency by replacing ''business area or support function'' with ''business line or functional unit,'' as the latter reflects usage of text in underlying MRM internal procedures.

Second, the Clearing Agencies believe that adding to the Model Inventory certain methodologies used to implement configuration choices made by the Clearing Agencies, such as data sources, model parameters, and model performance monitoring, including but not limited to backtesting, that are not inherent to model selection or design and that do not materially impact a model's results, and are not models subject to this Framework, may provide benefits for the Clearing Agencies in terms of monitoring and tracking of such methodologies. In this regard, the Clearing Agencies would add text to reflect that such methodologies may be added to the Model Inventory at MRM's discretion.

Finally, in the third paragraph of this section, the Clearing Agencies would change a reference to ''risk management standards'' to ''Standards'' to conform to the defined term for the Covered Clearing Agency Standards used throughout the Framework.

Section 3.2 (Model Materiality and Complexity)

Section 3.2 of the Framework describes that a model's output can affect decision making (*e.g.,* decisions with respect to Clearing Fund/Participants Fund, backtesting, and stress testing measures), which may have a material impact on the Clearing Agency, and that each model subject to the Framework is assigned a materiality/complexity rating in this regard. The section states that ''[m]ateriality/complexity index assignments are made at the time the applicable model is added to the Model Inventory and are used by MRM for Model Validation prioritization. All model materiality/complexity index assignments are reviewed at least annually by MRM, as well as by the Model Risk Governance Council (''MRGC''), the forum for review of model risk matters.'' Pursuant to the proposed rule change, the Clearing Agencies would replace both appearances of the words ''index assignments'' in these two sentences with ''scores.'' This change would align the text of the Framework with MRM's practice, whereby MRM reviews materiality and complexity scores of a model, which directly determine the applicable materiality/complexity rating, at least annually.[22]

Section 3.3 (Full Model Validation)

In addition to deleting ''full'' where it appears as a modifier to ''model validation'' in Section 3.3 of the Framework, as described above, including in the title of the section, the proposed rule change would make other technical and clarifying changes to this section.

In a paragraph that describes Model Validation activities performed for new models:

(i) A reference to ''model development documentation and testing'' would be changed to ''model

[18] 17 CFR 240.17Ad–22(e)(4)(vii).

[19] 17 CFR 240.17Ad–22(e)(7)(vii).

[20] 17 CFR 240.17Ad–22(e)(3).

[21] *See supra* note 7.

[22] Specifically, the Clearing Agencies use the ''DTCC Model Development Standards,'' which is a document describing that materiality and complexity scores for a model, which scores are based on certain factors, underlie the determination of the materiality/complexity rating of the model. In accordance with the DTCC Model Development Standards, factors relating to the materiality score include model usage, model hierarchy and model exposure. The factors relating to the complexity score include structural complexity, and data availability and treatment.

documentation and development testing'';

(ii) a reference to ''evaluation of data inputs and parameters'' would be changed to ''evaluation of model inputs and parameters'';

(iii) a reference to ''review of numerical implementation (including replication for certain key model components, which will vary from model to model)'' would be changed to ''review of model implementation for consistency with documentation'';

(iv) a reference to ''independent testing: sensitivity analysis, stress testing, and benchmarking, as appropriate'' would be changed to ''independent testing: model output evaluation, backtesting, sensitivity analysis, stress testing, and benchmarking, as appropriate''; and

(v) a reference to ''evaluation of model outputs, model performance, and back testing'' would be changed to ''evaluation of model performance monitoring (or ''MPM'') plan and results.'' Similarly, a reference to ''model performance monitoring reports'' in Section 3.8 of the Framework (Model Performance Monitoring) would be revised to consider the definition of the term MPM described above. In this regard, this reference in Section 3.8 would be revised to instead refer to ''MPM reports.''

In the second paragraph of this section, the third sentence states: ''The Application Development Department for the Clearing Agencies will perform certain production release quality assurance checks (*e.g.,* user acceptance testing/systems integration testing (UAT/SAT)).'' Pursuant to the proposed rule change, this sentence would be revised to delete ''Application Development Department for the'' and ''(UAT/SAT)''. This change would generalize the text to eliminate the need to revise the document in the event the name of the area that performs such testing changes.

The Clearing Agencies would also revise this paragraph with respect to text relating to ratings assigned to a model upon validation. In this regard, the Framework currently describes that the result of each Model Validation is a model validation report prepared by MRM (''Model Validation Report''), a key section of which is the summary of all findings and recommendations ranked according to the findings' severity level, inclusive of any identified model limitations and compensating controls for the model. This text would be revised to remove the reference to recommendations as part of the Model Validation Report because, pursuant to MRM's procedures, while the Model Validation Report includes findings, it does not include recommendations. In addition, the severity level of the findings is described in this section to be classified as H, M or L, which the Clearing Agencies intend as abbreviations for ''High,'' ''Medium,'' and ''Low.'' However, as these abbreviations are not otherwise defined in the Framework, the Clearing Agencies would replace the abbreviations with the full spelling of the classifications, such that the instances in the text of ''H,'' ''M,'' and ''L'' would be replaced with ''High,'' ''Medium,'' and ''Low,'' respectively.

This paragraph also describes that MRM will provide an overall assessment for each model having undergone a Model Validation (''Model Grade'').[23] The Clearing Agencies propose to clarify this text such that it describes each model that has been approved, as being rated (in the form of a Model Grade) by MRM, rather than providing an overall assessment.

This paragraph states further that the Model Grade, together with the model materiality/complexity index assignment, serves to provide context for MRM's overall assessment of the model's suitability and performance for its intended purpose. As with the revision described immediately above, the Clearing Agencies would remove the reference to a Model Grade as representing an overall assessment of the model. In its place, the proposed rule change would provide a description that the Model Grade outlines the overall assessed quality of the model developer's efforts to develop the model and the extent to which the model developer has effectively reduced model risk during model development.

In addition, it is the Model Grade that rates these development quality considerations and risk factors, and the Model Grade does not depend on the model materiality/complexity index assignment and is not intended to signify the overall suitability of the model for its intended purpose. Therefore, the Clearing Agencies would clarify this point to remove the reference to model materiality and complexity as being a factor in determining the Model Grade, as well as delete text that indicates the Model Grade reflects the suitability of a model for its intended purpose.

Section 3.4 (Periodic Model Validation)

Section 3.4 of the Framework describes that MRM shall perform a Model Validation for each model subject to this Framework that is approved for use in production not less than annually (or more frequently as may be contemplated by such Clearing Agency's established risk management framework), including each credit risk model,[24] each liquidity risk model,[25] and each CCP's margin systems and related models,[26] as required by the risk management standards set forth in the Framework. This type of Model Validation is referred to generally in the Framework as ''periodic'' Model Validation. In this regard, for the sake of clarity, the Clearing Agencies would insert the word ''periodic'' as a modifier for Model Validation in the first sentence of the first paragraph of this section.

In addition, the Clearing Agencies would delete a paragraph from this section that states: ''Periodic Model Validations follow full Model Validation standards. In certain cases, MRM may determine extra Model Validation activities are warranted based on previous Model Validation work and findings, changes in market conditions, or because performance monitoring of a particular model warrants extra validation.'' This text would be deleted because, as noted above, the Framework recognizes one definition of Model Validation and the provisions relating to how Model Validation is conducted apply to all models regardless of timing, and it is unnecessary to state that periodic Model Validation follows the same standards as ''full'' Model Validation since there is only one concept of Model Validation. In addition, the reference to extra Model Validation activities is duplicative as the Framework contains other text indicating that Model Validations may be performed for a given model more frequently than on the minimum annual basis.

Section 3.5 (Model Change Management)

Section 3.5 of the Framework describes provisions relating to changes in models. The text of this section refers to a ''version change'' of a model in describing changes to third-party models. The section is intended to apply to any changes to a model and it is unnecessary to modify the word change, including with ''version.'' Therefore, the Clearing Agencies would

[23] The Clearing Agencies' current grading scale consists of three grades—''A,'' ''B,'' and ''C.'' Any Clearing Agency may add or remove grading levels in its discretion, the parameters of which shall be reflected in written procedures established by such Clearing Agency.

[24] *See* 17 CFR 240.17Ad–22(e)(4)(vii).

[25] *See* 17 CFR 240.17Ad–22(e)(7)(vii).

[26] *See* 17 CFR 240.17Ad–22(e)(6)(vii).

delete the word ''version'' where it appears before ''change'' in this section.

Section 3.6 (Model Approval and Control)

In addition to the proposed change described above to extend the period allowable for a provisional approval to remain in effect, the Clearing Agencies would revise a sentence in Section 3.6 of the Framework that states: ''Provisional approval requests along with appropriate control measures must be presented by the applicable Model Owner to MRM.'' The sentence as written is duplicative as the first paragraph of Section 3.6 states that models must be submitted to MRM for approval. However, given the focus of this section on the approval of models, the Clearing Agencies believe that the section should more clearly state where the approval authority resides for provisional models. As stated above, it is MRM's responsibility to approve models. Therefore, the Clearing Agencies would revise the sentence described above to read: ''Provisional approval requests along with appropriate control measures must be approved by MRM.''

A sentence that states: ''All new models, and all material changes to existing models, shall undergo Model Validation by MRM and then be approved by MRM prior to business use'' would be revised to replace the word ''then'' with ''must'' to clarify the requirement that a model must be approved by MRM prior to use.

Section 3.7 (Resolution of Model Validation Findings)

Consistent with the proposed change described above to remove the description of a group within the Group Chief Risk Office as a ''unit,'' the Clearing Agencies would revise a reference to ''the Operational Risk Management unit'' to delete the word ''unit'' from this reference. Also, the Clearing Agencies would delete the word ''the'' before ''Operational Risk'' because it would not be grammatically correct when ''unit'' is deleted. In addition, the group name of ''Operational Risk Management,'' as set forth in this reference, would be revised to ''Operational Risk'' to reflect a recent name change of this group from Operational Risk Management to Operational Risk. In connection with this name change, the term ''ORM'' that is used in this section to define ''Operational Risk Management'' would be deleted. Also, in this regard, two subsequent references to ORM in the Framework, which appear in Section 3.7 and Section 4.2, respectively, would be removed and replaced with ''Operational Risk.''

Section 3.8 (Model Performance and Monitoring)

In addition to a change relating to the definition of MRM described above, the Clearing Agencies would revise a footnote in Section 3.8 of the Framework. The footnote 29 describes the role Quantitative Risk Management (''QRM'') performs with respect to the CCPs' margin models. A sentence within the note states that a representative of QRM self-elects as the owner of a margin model. In fact, the CCPs' procedures would require the representative to be appointed as the owner of a model. Therefore, the Clearing Agencies would revise this footnote to reflect that a representative of QRM is appointed as the owner of a model.

This section also contains a statement that MRM is responsible for providing oversight of model performance monitoring activities by setting organizational standards and providing critical analysis for identifying model issues and/or limitations. This statement has a footnote that states the organizational standards apply to DTCC's [27] subsidiaries, as applicable. This footnote is unnecessary because the Framework applies only to the Clearing Agencies and no other subsidiaries of DTCC, and the mention to DTCC's subsidiaries in general is extraneous. Therefore, pursuant to the proposed rule change, the Clearing Agencies would delete this footnote.

Section 3.9 (Backtesting)

Section 3.9 of the Framework contains a description of backtesting performed by the Clearing Agencies. Pursuant to the proposed rule change, this section would be revised to delete references to backtesting performed by DTC and related text, including applicable metrics and thresholds, and a related footnote that describes the designation of DTC account families by DTC Participants for purposes of managing Collateral Monitor and Net Debit Cap. The proposed change would be consistent with the Covered Clearing Agency Standards, which pursuant to Rule 17Ad–22(e)(6) [28] requires certain backtesting to be performed by the CCPs. As indicated above, this rule does not apply to DTC.[29] In this regard, a reference to a backtesting metric (Collateral Group Collateral Monitor Coverage) mentioned in Section 4.2 of the Framework (Escalation) would also be deleted.

[27] The Depository Trust & Clearing Corporation (''DTCC'') is the parent company of the Clearing Agencies.

[28] *See* 17 CFR 240.17Ad–22(e)(6).

[29] *See supra* note 8.

Section 4.2 (Escalation)

A paragraph within Section 4.2 of the Framework states: ''On at least a monthly basis, the key metrics identified in Section 3.9 are reviewed by the Market and Liquidity Risk Management unit within the Group Chief Risk Office and reported to the MRC [30] by the group within the Group Chief Risk Office responsible for risk reporting. Threshold breaches will be reviewed by the Managing Directors within the Financial Risk Management area (including the Market and Liquidity Risk Management unit) of the Group Chief Risk Office, and in the case of CFR Coverage breaches by the CCPs and Collateral Group Collateral Monitor Coverage by DTC, escalated to the BRC in accordance with the applicable Risk Tolerance Statement.''

Pursuant to the proposed rule change, first, the reference to a Market and Liquidity Risk Management unit would be revised to reflect only the Market Risk Management unit. Today, the Market Risk Management and Liquidity Risk Management areas are under separate management, and Market Risk Management is the area that performs the review of key metrics described in the paragraph.

Second, the Clearing Agencies would revise the paragraph to remove the parenthetical that states, ''including the Market and Liquidity Risk Management unit,'' after a reference to the Financial Risk Management area's role in the review of threshold breaches of key metrics, as both units are part of Financial Risk Management, and therefore the parenthetical is unnecessary. In this regard, the proposed modification would enhance readability.

Third, the Clearing Agencies would remove the text ''by the group within the Group Chief Risk Office responsible for risk reporting'' as it is unnecessary since it can be inferred that reports would be provided by the group responsible for such reporting.

2. Statutory Basis

The Clearing Agencies believe that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[31] as well as Rules 17Ad–22(e)(4), (e)(6), and

[30] MRC refers to the Management Risk Committee of the Boards of Directors of the Clearing Agencies.

[31] 15 U.S.C. 78q–1(b)(3)(F).

(e)(7) thereunder,[32] for the reasons described below.

Section 17A(b)(3)(F) of the Act[33] requires, *inter alia,* that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. As described above, the proposed rule change enhances (i) the Clearing Agencies' ability to complete modifications to a provisionally approved model prior to the performance of a model validation and (ii) the text of the Framework to facilitate clarity for the areas within the Clearing Agencies that perform responsibilities with regard to model risk management and compliance with the Framework. By enhancing the Framework in this regard, the proposed rule change supports the Clearing Agencies' performance of their responsibilities under the Framework, including but not limited to assuring that models developed function as intended to support the Clearing Agencies in identifying, measuring, monitoring, and managing their respective credit exposures, liquidity risks and, as applicable, the maintenance of sufficient margin to cover these risks. In this regard, the proposed rule change would promote the safeguarding of securities and funds which are in the custody or control of the Clearing Agencies or for which they are responsible, by promoting the ability of the Clearing Agencies to manage credit exposures and liquidity risk that may impact the safeguarding of those funds and securities.

Rules 17Ad–22(e)(4), (e)(6), and (e)(7) under the Act[34] require, *inter alia,* that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage risks associated with its credit risk management models, margin models, and liquidity risk management models, respectively, as applicable. As discussed above, the proposed rule change enhances (i) the Clearing Agencies' ability to complete modifications to a provisionally approved model prior to the performance of a model validation and (ii) the text of the Framework to facilitate clarity for the areas within the Clearing Agencies that perform responsibilities with regard model risk management and compliance with the Framework. By enhancing the Framework in this regard, the proposed rule change supports the Clearing Agencies' performance of their responsibilities under the Framework, including but not limited to assuring that models developed function as intended to support the Clearing Agencies in identifying, measuring, monitoring, and managing their respective credit exposures, liquidity risks and, as applicable, the maintenance of sufficient margin to cover these risks. Therefore, the Clearing Agencies believe that the proposed changes to the Framework are consistent with Rules 17Ad–22(e)(4), (e)(6), and (e)(7).[35]

(B) Clearing Agency's Statement on Burden on Competition

The Clearing Agencies do not believe that the proposed rule change would have any impact, or impose any burden, on competition because the proposed rule change simply modifies the Framework governing the management of model risk by the Clearing Agencies and (a) would not effectuate any changes to the Clearing Agencies' model risk management tools as they apply to their respective Members or Participants and (b) would not have an effect with respect to the obligations of participants utilizing Clearing Agency services.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Clearing Agencies have not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

The Clearing Agencies reserve the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[36] and Rule 19b–4(f)(6) thereunder.[37]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–2022–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2022–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the

[32] 17 CFR 240.17Ad–22(e)(4), (e)(6), and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[33] 15 U.S.C. 78q–1(b)(3)(F).

[34] 17 CFR 240.17Ad–22(e)(4), (e)(6), and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[35] *Id.*

[36] 15 U.S.C. 78s(b)(3)(A).

[37] 17 CFR 240.19b–4(f)(6).

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2022–001 and should be submitted on or before March 17, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03872 Filed 2–23–22; 8:45 am]

BILLING CODE 8011–01–P

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94277; File No. SR–NASDAQ–2021–101]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Change To Amend Equity 4, Rule 4754 Relating to Certain Order Handling in the Limit Up-Limit Down Closing Cross

February 17, 2022.

I. Introduction

On December 22, 2021, The Nasdaq Stock Market LLC (''Exchange'' or ''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Equity 4, Rule (''Rule'') 4754 relating to certain order handling in the Limit Up-Limit Down (''LULD'') closing cross. The proposed rule change was published for comment in the **Federal Register** on January 5, 2022.[3] The Commission has not received any comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Nasdaq closing cross is the Exchange's process for determining the price at which orders will be executed at the close and for executing those orders.[4] In advance of the closing cross, the Exchange disseminates an early order imbalance indicator (''EOII'') every 10 seconds, beginning at 3:50 p.m.[5] until the order imbalance indicator (''NOII'') begins to disseminate.[6] The Exchange disseminates the NOII every second, beginning at 3:55 p.m. until market close.[7] Both the EOII and the NOII include, among other things, the current reference price for a security, which is the single price that is at or within the current Nasdaq best bid and offer at which the maximum number of shares of market on close, limit on close (''LOC''), and imbalance only orders can be paired.[8]

Currently, Exchange participants may enter LOC orders between 4 a.m. and immediately prior to 3:55 p.m. for participation in the closing cross.[9] Exchange participants may also enter LOC orders between 3:55 p.m. and immediately prior to 3:58 p.m. (''Late LOC orders''), provided that there is a First Reference Price (*i.e.,* the current reference price disseminated in the EOII at 3:50 p.m.)[10] or a Second Reference Price (*i.e.,* the current reference price disseminated in the NOII at 3:55 p.m.)[11] for the security.[12] A Late LOC order to buy (sell) is accepted at its limit price, unless its limit price is higher (lower) than the higher (lower) of the First Reference Price and the Second Reference Price, in which case the Late LOC order will be handled consistent with the participant's instruction that order is to be either rejected or re-priced to the higher (lower) of the First Reference Price and the Second Reference Price.[13]

The LULD closing cross is the Exchange's process for executing closing trades in Nasdaq-listed securities when an LULD trading pause exists at or after 3:50 p.m. and before 4:00 p.m.[14] In May 2021, the Commission approved SR–NASDAQ–2021–009, which included certain changes to the Exchange's LULD closing cross process.[15] As approved, consistent with the regular closing cross, the Exchange would disseminate the EOII for the LULD closing cross every 10 seconds beginning at 3:50 p.m. until the Exchange begins to disseminate the NOII, and the NOII would be disseminated every second beginning at 3:55 p.m. until market close.[16] Unlike the regular closing cross, the reference price contained in such EOII and NOII represents the price at which the LULD closing cross would execute should the cross conclude at that time, and that price is bound by benchmarks that are calculated using either the LULD price bands or the auction collars for reopening following an LULD trading pause, depending on the time the trading pause was initiated and whether the trading pause was extended.[17] Also as approved in SR–NASDAQ–2021–009, consistent with the regular closing cross, LOC orders (including Late LOC orders) for the LULD closing cross may be entered, modified, and cancelled pursuant to Rule 4702(b)(12).[18] In accordance with Rule 4702(b)(12), the Exchange would determine whether Late LOC orders may be entered, rejected, or re-priced using the reference prices disseminated in the EOII and NOII.

The Exchange now proposes to amend the handling of Late LOC orders in an LULD closing cross. Specifically, for purposes of determining whether to accept, reject, or re-price a Late LOC order, the Exchange would use the First Reference Price and the Second Reference Price, if any, that was disseminated in the regular closing cross EOII and NOII, instead of any First Reference Price and Second Reference Price that was disseminated in the LULD closing cross EOII and NOII.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 93876 (December 29, 2021), 87 FR 501 (''Notice'').

[4] *See* Rule 4754(a)(6).

[5] All times referenced are in Eastern Time.

[6] *See* Rule 4754(b)(1)(A).

[7] *See* Rule 4754(b)(1)(B).

[8] *See* Rule 4754(a)(7)(A) (also setting forth various tie breakers if more than one price meets this definition) and Rule 4754(a)(10).

[9] *See* Rule 4702(b)(12).

[10] *See* Rule 4754(a)(9).

[11] *See* Rule 4754(a)(11).

[12] *See* Rule 4702(b)(12).

[13] *See id.* (also describing the rounding methodology if the First Reference Price or Second Reference Price is not at a permissible minimum increment).

[14] *See* Rule 4754(b)(6).

[15] *See* Securities Exchange Act Release No. 92068 (May 28, 2021), 86 FR 29864 (June 3, 2021). The Exchange has not yet implemented the changes made in SR–NASDAQ–2021–009. *See* Notice, *supra* note 3, at 501.

[16] *See* Rule 4754(b)(6)(C).

[17] *See id.* and Rule 4754(b)(6)(E).

[18] *See* Rule 4754(b)(6)(F)(ii).

Accordingly, as proposed, if a security entered an LULD trading pause prior and up to 3:50 p.m., the Exchange would not accept Late LOC orders in that security,[19] because that security would not have a regular closing cross First Reference Price or Second Reference Price.[20] In addition, if a security entered an LULD trading pause after 3:50 p.m. and up to 3:55 p.m., the Exchange would accept Late LOC orders in that security, provided that there is a regular closing cross First Reference Price.[21] A security that entered an LULD trading pause after 3:50 p.m. and up to 3:55 p.m. could have a regular closing cross First Reference Price, but would not have a regular closing cross Second Reference Price.[22] Finally, if a security entered an LULD trading pause after 3:55 p.m., the Exchange would accept Late LOC orders in that security, provided that there is a regular closing cross First Reference Price or Second Reference Price.[23] A security that entered an LULD trading pause after 3:55 p.m. could have both a regular closing cross First Reference Price and a regular closing cross Second Reference Price.[24]

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[25] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[26] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

As described above, the Exchange proposes to use the First Reference Price and the Second Reference Price, if any, that was disseminated in the regular closing cross EOII and NOII, for purposes of determining whether to accept, reject, or re-price a Late LOC order in the LULD closing cross. The Commission believes that the Exchange's proposal would allow consistent handling of Late LOC orders in the LULD closing cross and the regular closing cross. The Commission also believes that the proposal would allow the Exchange to consistently use reference prices that are bound by the Nasdaq best bid and offer (*i.e.,* the First Reference Price and Second Reference Price, if any, disseminated for the regular closing cross) for purposes of determining whether to accept, reject, or re-price Late LOC orders, regardless of whether a security entered an LULD trading pause prior and up to 3:50 p.m., after 3:50 p.m. and up to 3:55 p.m., or after 3:55 p.m.[27] Accordingly, the Commission believes that the proposal would promote a more consistent experience for Exchange participants that choose to submit Late LOC orders to participate in the Exchange's closing crosses.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[28] that the proposed rule change (SR–NASDAQ–2021–101), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03876 Filed 2–23–22; 8:45 am]

BILLING CODE 8011–01–P

[19] *See* proposed Rule 4754(b)(6)(F)(ii)(a).

[20] *See* Notice, *supra* note 3, at 503 n.15. A security that entered an LULD trading pause prior and up to 3:50 p.m. would instead have an LULD closing cross First Reference Price and Second Reference Price. *See id.* at 503.

[21] Such orders may then be rejected or subject to re-pricing in accordance with Rule 4702(b)(12), in either case consistent with the participant's instructions. *See* proposed Rule 4754(b)(6)(F)(ii)(b).

[22] *See* Notice, *supra* note 3, at 503 n.16. A security that entered an LULD trading pause after 3:50 p.m. and up to 3:55 p.m. would instead have an LULD closing cross Second Reference Price. *See id.* at 503.

[23] Such orders may then be rejected or subject to re-pricing in accordance with Rule 4702(b)(12), in either case consistent with the participant's instructions. *See* proposed Rule 4754(b)(6)(F)(ii)(c).

[24] *See* Notice, *supra* note 3, at 503 n.17.

[25] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 15 U.S.C. 78f(b)(5).

[27] *See supra* notes 20, 22, and 24 and accompanying text (describing the different First and Second Reference Prices that are calculated for a security, depending on whether the security entered an LULD trading pause prior and up to 3:50 p.m., after 3:50 p.m. and up to 3:55 p.m., or after 3:55 p.m.).

[28] 15 U.S.C. 78s(b)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94272; File No. SR–NSCC–2022–001]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Clearing Agency Model Risk Management Framework

February 17, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 11, 2022, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Clearing Agency Model Risk Management Framework (''Framework'') of NSCC and its affiliates, The Depository Trust Company (''DTC'') and Fixed Income Clearing Corporation (''FICC,'' and together with NSCC, the ''CCPs,'' and the CCPs together with DTC, the ''Clearing Agencies'').[5] The Framework has been adopted by the Clearing Agencies to support their compliance with Rule 17Ad–22(e) (the ''Covered Clearing Agency Standards'') under the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The Framework sets forth the model risk management practices that the Clearing Agencies follow to identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The Framework is filed as a rule of the Clearing Agencies. *See* Securities Exchange Act Release Nos. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File Nos. SR–DTC–2017–008, SR–FICC–2017–014, SR–NSCC–2017–008) (''2017 Notice''); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (File Nos. SR–DTC–2020–008, SR–FICC–2020–004, SR–NSCC–2020–008); and 92379 (July 13, 2021), 86 FR 38143 (July 19, 2021) (File No. SR–DTC–2021–013), 92381 (July 13, 2021), 86 FR 38163 (July 19, 2021) (File No. SR–NSCC–2021–008), and 92380 (July 13, 2021), 86 FR 38140 (July 19, 2021) (File No. SR–FICC–2021–006) (collectively, the ''MRMF Filings'').

Act,[6] and, in this regard, applies solely to models [7] utilized by the Clearing Agencies that are subject to the model risk management requirements set forth in Rules 17Ad–22(e)(4), (e)(6), and (e)(7) under the Act.[8]

The proposed rule change would amend the Framework [9] to (i) harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework; (ii) provide that provisional approvals of models may be extended if approved by the Managing Director of Model Risk Management (''MRM'') and notice thereof is given to the Group Chief Risk Officer; however, in no event shall any provisional approval, together with any extension(s) granted, exceed one year and (iii) make other technical and clarifying changes to the text, as described below.

[6] 17 CFR 240.17Ad–22(e). Each of DTC, NSCC and FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with Rule 17Ad–22(e).

[7] Pursuant to Section 3.1 of the Framework, the Clearing Agencies have adopted the following definition of ''model'': ''[M]odel'' refers to a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates. A ''model'' consists of three components: (i) An information input component, which delivers assumptions and data to the model; (ii) a processing component, which transforms inputs into estimates; and (iii) a reporting component, which translates the estimates into useful business information. The definition of model also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature. *See* 2017 Notice, *supra* note 5. *See also* Supervisory Guidance on Model Risk Management, SR Letter 11–7 Attachment, dated April 4, 2011, issued by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, *available at https://www.federalreserve.gov/supervisionreg/srletters/sr1107a1.pdf,* page 3.

[8] 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC because DTC is not a central counterparty.

[9] Amending the Framework does not require any changes to the Rules, By-Laws and Organization Certificate of DTC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf*) (the ''DTC Rules''), the Rulebook of the Government Securities Division of FICC (*available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf*) (the ''GSD Rules''), the Clearing Rules of the Mortgage-Backed Securities Division of FICC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf*) (the ''MBSD Rules''), or the Rules & Procedures of NSCC (*available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf*) (the ''NSCC Rules,'' and collectively with the DTC Rules, GSD Rules, and MBSD Rules, the ''Rules''), because the Framework is a standalone document. *See* MRMF Filings, *supra* note 5.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Framework to (i) harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework; (ii) provide that provisional approvals of models may be extended if approved by the Managing Director of MRM and notice thereof is given to the Group Chief Risk Officer; however, in no event shall any provisional approval, together with any extension(s) granted, exceed one year and (iii) make other technical and clarifying changes to the text, as described below.

Background

The Covered Clearing Agency Standards require that the Clearing Agencies take steps to manage the models that they employ in identifying, measuring, monitoring, and managing their respective credit exposures and liquidity risks, including that the Clearing Agencies conduct daily backtesting of model performance, periodic sensitivity analyses of models, and annual validation of models.[10] The Framework is maintained by the Clearing Agencies to support their compliance with the requirements of the Covered Clearing Agency Standards relating to model risk management.

The Framework outlines the applicable regulatory requirements mentioned above, describes the risks that the Clearing Agencies' model risk management program are designed to mitigate, and sets forth specific model risk management practices and requirements adopted by the Clearing Agencies to ensure compliance with the Covered Clearing Agency Standards. These practices and requirements include, among other things, the maintenance of a model inventory (''Model Inventory''), a process for rating model materiality and complexity, processes for performing model validations and resolving findings identified during model validation, and processes for model performance monitoring, including backtesting and sensitivity analyses. The Framework also describes applicable internal ownership and governance requirements.[11]

[10] *See* 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

The proposed rule change would harmonize the terminology used in the Framework relating to model validation, with the definition used by the Covered Clearing Agency Standards, by deleting ''full'' where it appears as a modifier to ''model validation'' in the Framework. The proposed rule change would also amend the Framework to provide the Clearing Agencies with the ability to make limited time extensions for provisional approvals of models. In this regard, the proposed rule change is designed to facilitate the Clearing Agencies' ability to prudently manage contingencies relating to events or changes of circumstance that may impact the Clearing Agencies' management of credit risk, margin, and liquidity risk management models, in accordance with the Framework. Additionally, the proposed rule change would make technical and clarifying changes to the text of the Framework, as described below.

Proposed Rule Change

Eliminate References to ''Full'' Model Validation

With respect to model validation, the Covered Clearing Agency Standards refer to the term simply as ''model validation,'' as defined by Rule 17Ad–22(a)(9) under the Act.[12] However, the Framework refers to model validation both as a ''full model validation'' and ''model validation,'' and as an undefined and defined term depending on usage. For example, Section 1 (Executive Summary) of the Framework

[11] *See* MRMF Filings, *supra* note 5, for additional information on the contents of the Framework.

[12] The term ''model validation'' means an evaluation of the performance of each material risk management model used by a covered clearing agency (and the related parameters and assumptions associated with such models), including initial margin models, liquidity risk models, and models used to generate clearing or guaranty fund requirements, performed by a qualified person who is free from influence from the persons responsible for the development or operation of the models or policies being validated. 17 CFR 240.17Ad–22(a)(9).

describes Section 3 (Model Risk Management Framework), among other things, as including a discussion on ''full model validation.'' Yet, ''Model Validation'' is first defined in Section 3 as the definition used by the Covered Clearing Agency Standards, which does not use the modifier ''full.'' Moreover, references to full model validation and model validation in the Framework have the same meaning, as the Framework does not distinguish between the two.

To address these unnecessary variations, the Clearing Agencies propose to harmonize the terminology used in the Framework relating to model validation, with the applicable term used in the Covered Clearing Agency Standards, by deleting ''full'' in all instances where it appears as a modifier to ''model validation'' in the Framework. In this regard, the word ''full'' preceding ''model validation'' would be deleted from the Framework in all instances where it appears, including (i) from the reference in Section 1 of the Framework, mentioned above, (ii) renaming Section 3.3 of the Framework, named Full Model Validation, as ''Model Validation,'' and (iii) deleting four appearances of the word ''full'' before ''Model Validation'' in the text of Section 3.

Extension of Provisional Approvals of Models

The Covered Clearing Agency Standards require that the Clearing Agencies identify, measure, monitor, and manage their respective credit exposures and liquidity risks by performing model validations of their respective credit risk and liquidity risk models not less than annually or more frequently as may be contemplated by the applicable Clearing Agency's established risk management framework.[13] A covered clearing agency that is a central counterparty must perform a model validation for its margin system and related models not less than annually or more frequently as may be contemplated by such central counterparty's risk management framework.[14]

Section 3.6 of the Framework (Model Approval and Control) provides that new models, and material changes to existing models, shall undergo model validation by MRM and then be approved by MRM prior to business use.

In the absence of a Model Validation, provisional approvals with respect to new models and material changes to existing models may be issued to allow a model to be used for urgent business purposes prior to the completion of MRM's Model Validation. Such provisional approval requests must be presented by the applicable Model Owner[15] to MRM, which may provisionally approve the model for a limited period not to exceed six months.

The Framework does not provide for extensions of this six-month provisional approval period. However, MRM has observed, over time and since the Framework was initially filed,[16] that it could take longer than six months to complete a model validation in accordance with the timeframe set forth in Section 3.3 of the Framework. For example, a model that has been provisionally approved and put into use while undergoing further modification and/or enhancement by a third-party developer, cannot undergo validation by MRM until such time as the developer has completed its process and made the enhanced model available to the Clearing Agencies. Considering the amount of time it may take for the developer to complete and deliver the modification and/or enhancement to the Clearing Agencies, as well as MRM's validation process itself, it may be necessary for the model to operate under provisional approval for a period greater than six months.

Therefore, pursuant to the proposed rule change, the Clearing Agencies would amend Section 3.6 of the Framework to provide that provisional approvals of models may be extended if approved by the Managing Director of MRM and notice thereof is given to the Group Chief Risk Officer; however, in accordance with the Covered Clearing Agency Standards requirements that credit, liquidity and margin models, as applicable, be validated at least annually,[17] in no event shall any provisional approval, together with any extension(s) granted, exceed one year. In this regard, the proposed rule change would accommodate the incorporation of any modifications and enhancements identified by a developer into a provisionally approved model prior to model validation, and still allow the model validation to be completed within a timeframe that would be consistent with the requirements of both the Framework and the Covered Clearing Agency Standards.

Technical and Clarifying Changes

Section 1 (Executive Summary)

A sentence in Footnote 8 under Section 1 (Executive Summary) of the Framework would be revised for clarity and grammatical usage. The footnote describes the Model Risk Tolerance Statement and the Market Risk Tolerance Statement, which are listed in Section 1 among a series of documents used by the Clearing Agencies to support their execution of the Framework. In describing the Market Risk Tolerance Statement, the footnote states: ''. . . the Market Risk Tolerance Statement, which articulates, among other things, risk tolerance levels covering margin backtests covering backtest coverage and stress tests covering exposure to extreme market moves.'' The proposed rule change would eliminate certain repetitive usage of ''covering'' and ''coverage'' in the text quoted above such that the applicable text would read as follows: ''. . . the Market Risk Tolerance Statement, which articulates, among other things, risk tolerance levels covering margin backtests and stress tests related to exposure to extreme market moves.''

Section 2 (Model Risk Management Requirements)

The first paragraph of Section 2 is intended by the Clearing Agencies to describe that in compliance with Rules 17Ad–22(e)(4)(vii),[18] and (e)(7)(vii)[19] of the Covered Clearing Agency Standards, each Clearing Agency is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to perform model validations on its credit risk models and liquidity risk models not less than annually or more frequently as may be contemplated by the Clearing Agency's risk management framework established pursuant to Rule 17Ad–22(e)(3).[20] The main text of the paragraph contains typographical errors, in that in place of the reference to section (e) in each of the three rules citied in the paragraph, it instead includes an erroneous reference to a section (C). However, the footnotes to these references contain the correct citations. The Clearing Agencies would revise the main text of the paragraph to correct the erroneous references to section (C) to instead refer to section (e).

[13] *See* 17 CFR 240.17Ad–22(e)(4)(vii) and (e)(7)(vii).

[14] *See* 17 CFR 240.17Ad–22(e)(6)(vii).

[15] Pursuant to Section 3.1 of the Framework, the ''Model Owner'' is the person designated by the applicable business area or support function to be responsible for a particular model. The Model Owner is recorded in the Model Inventory.

[16] *Supra* note 5.

[17] *See* 17 CFR 240.17Ad–22(e)(4)(vii), (e)(6)(vii) and (e)(7)(vii).

[18] 17 CFR 240.17Ad–22(e)(4)(vii).

[19] 17 CFR 240.17Ad–22(e)(7)(vii).

[20] 17 CFR 240.17Ad–22(e)(3).

Section 3.1 (Model Inventory)

Section 3.1 (Model Inventory) (i) sets forth the definition of model adopted by the Clearing Agencies,[21] (ii) defines MRM as responsible for model risk management as a second-line function that is charged with determining whether any proposed method, system, or approach designed for Clearing Agency use meets the definition of model, (iii) provides a definition of Model Inventory as the definitive list of models subject to the Framework, (iv) describes a model inventory survey that is conducted at least annually across the Clearing Agencies to confirm that the Model Inventory is current, and (v) describes that all models subject to the Framework are validated, as described in the Framework.

The proposed rule change would make technical and clarifying changes to the second paragraph of this section, which states:

> The Model unit within the Group Chief Risk Office that is responsible for model risk management as a second-line function (''MRM'') is charged with determining whether any proposed method, system, or approach designed for Clearing Agency use meets the above definition. All models subject to this Framework will be added to the definitive list of models (''Model Inventory'') and tracked by MRM. A Model Inventory Survey is conducted at least annually across the Clearing Agencies to confirm the Model Inventory is current (''Annual Model Inventory Survey''). During the Annual Model Inventory Survey, any business area or support function intending to have a model developed for Clearing Agency use will submit materials relevant to such proposed model for MRM to review and assess whether such proposed model will be added to the Model Inventory. The person designated by the applicable business area or support function to be responsible for a particular model (''Model Owner'') is recorded as the Model Owner for such model by MRM in the Model Inventory.

First, for enhanced clarity, the first sentence of the paragraph would be revised to replace the initial reference to ''The Model'' with ''Model Risk Management'' and define the term as ''MRM'' directly after it is mentioned, rather than after additional descriptive text that follows in the sentence. The proposed rule change would also eliminate the reference to MRM as a ''unit'' because this reference is redundant given the context describing the functionality of MRM implies that it is a unit or group. Conforming grammatical changes would also be made to delete ''that'' after ''Group Chief Risk Office'' and add ''and'' after ''second-line function.'' The third sentence of the paragraph would be revised to make the initial letters in the words ''Model Inventory Survey'' lower case (*i.e.,* ''model inventory survey'') as the term is not defined, but rather the reference is part of the description of the defined term ''Annual Model Inventory Survey'' that appears at the end of the sentence. The fourth sentence of the paragraph would be revised for consistency by replacing ''business area or support function'' with ''business line or functional unit,'' as the latter reflects usage of text in underlying MRM internal procedures.

Second, the Clearing Agencies believe that adding to the Model Inventory certain methodologies used to implement configuration choices made by the Clearing Agencies, such as data sources, model parameters, and model performance monitoring, including but not limited to backtesting, that are not inherent to model selection or design and that do not materially impact a model's results, and are not models subject to this Framework, may provide benefits for the Clearing Agencies in terms of monitoring and tracking of such methodologies. In this regard, the Clearing Agencies would add text to reflect that such methodologies may be added to the Model Inventory at MRM's discretion.

Finally, in the third paragraph of this section, the Clearing Agencies would change a reference to ''risk management standards'' to ''Standards'' to conform to the defined term for the Covered Clearing Agency Standards used throughout the Framework.

Section 3.2 (Model Materiality and Complexity)

Section 3.2 of the Framework describes that a model's output can affect decision making (*e.g.,* decisions with respect to Clearing Fund/ Participants Fund, backtesting, and stress testing measures), which may have a material impact on the Clearing Agency, and that each model subject to the Framework is assigned a materiality/ complexity rating in this regard. The section states that ''[m]ateriality/ complexity index assignments are made at the time the applicable model is added to the Model Inventory and are used by MRM for Model Validation prioritization. All model materiality/ complexity index assignments are reviewed at least annually by MRM, as well as by the Model Risk Governance Council (''MRGC''), the forum for review of model risk matters.'' Pursuant to the proposed rule change, the Clearing Agencies would replace both appearances of the words ''index assignments'' in these two sentences with ''scores.'' This change would align the text of the Framework with MRM's practice, whereby MRM reviews materiality and complexity scores of a model, which directly determine the applicable materiality/complexity rating, at least annually.[22]

Section 3.3 (Full Model Validation)

In addition to deleting ''full'' where it appears as a modifier to ''model validation'' in Section 3.3 of the Framework, as described above, including in the title of the section, the proposed rule change would make other technical and clarifying changes to this section.

In a paragraph that describes Model Validation activities performed for new models:

(i) A reference to ''model development documentation and testing'' would be changed to ''model documentation and development testing'';

(ii) a reference to ''evaluation of data inputs and parameters'' would be changed to ''evaluation of model inputs and parameters'';

(iii) a reference to ''review of numerical implementation (including replication for certain key model components, which will vary from model to model)'' would be changed to ''review of model implementation for consistency with documentation'';

(iv) a reference to ''independent testing: sensitivity analysis, stress testing, and benchmarking, as appropriate'' would be changed to ''independent testing: model output evaluation, backtesting, sensitivity analysis, stress testing, and benchmarking, as appropriate''; and

(v) a reference to ''evaluation of model outputs, model performance, and back testing'' would be changed to ''evaluation of model performance monitoring (or ''MPM'') plan and results.'' Similarly, a reference to ''model performance monitoring reports'' in Section 3.8 of the Framework (Model Performance Monitoring) would be revised to consider the definition of the term MPM described above. In this regard, this reference in Section 3.8 would be revised to instead refer to ''MPM reports.''

In the second paragraph of this section, the third sentence states: ''The Application Development Department for the Clearing Agencies will perform certain production release quality assurance checks (*e.g.,* user acceptance testing/systems integration testing (UAT/SAT)).'' Pursuant to the proposed

[21] *See supra* note 7.

[22] Specifically, the Clearing Agencies use the ''DTCC Model Development Standards,'' which is a document describing that materiality and complexity scores for a model, which scores are based on certain factors, underlie the determination of the materiality/complexity rating of the model. In accordance with the DTCC Model Development Standards, factors relating to the materiality score include model usage, model hierarchy and model exposure. The factors relating to the complexity score include structural complexity, and data availability and treatment.

rule change, this sentence would be revised to delete ''Application Development Department for the'' and ''(UAT/SAT)''. This change would generalize the text to eliminate the need to revise the document in the event the name of the area that performs such testing changes.

The Clearing Agencies would also revise this paragraph with respect to text relating to ratings assigned to a model upon validation. In this regard, the Framework currently describes that the result of each Model Validation is a model validation report prepared by MRM (''Model Validation Report''), a key section of which is the summary of all findings and recommendations ranked according to the findings' severity level, inclusive of any identified model limitations and compensating controls for the model. This text would be revised to remove the reference to recommendations as part of the Model Validation Report because, pursuant to MRM's procedures, while the Model Validation Report includes findings, it does not include recommendations. In addition, the severity level of the findings is described in this section to be classified as H, M or L, which the Clearing Agencies intend as abbreviations for ''High,'' ''Medium,'' and ''Low.'' However, as these abbreviations are not otherwise defined in the Framework, the Clearing Agencies would replace the abbreviations with the full spelling of the classifications, such that the instances in the text of ''H,'' ''M,'' and ''L'' would be replaced with ''High,'' ''Medium,'' and ''Low,'' respectively.

This paragraph also describes that MRM will provide an overall assessment for each model having undergone a Model Validation (''Model Grade'').[23] The Clearing Agencies propose to clarify this text such that it describes each model that has been approved, as being rated (in the form of a Model Grade) by MRM, rather than providing an overall assessment.

This paragraph states further that the Model Grade, together with the model materiality/complexity index assignment, serves to provide context for MRM's overall assessment of the model's suitability and performance for its intended purpose. As with the revision described immediately above, the Clearing Agencies would remove the reference to a Model Grade as representing an overall assessment of the model. In its place, the proposed rule change would provide a description that the Model Grade outlines the overall assessed quality of the model developer's efforts to develop the model and the extent to which the model developer has effectively reduced model risk during model development.

In addition, it is the Model Grade that rates these development quality considerations and risk factors, and the Model Grade does not depend on the model materiality/complexity index assignment and is not intended to signify the overall suitability of the model for its intended purpose. Therefore, the Clearing Agencies would clarify this point to remove the reference to model materiality and complexity as being a factor in determining the Model Grade, as well as delete text that indicates the Model Grade reflects the suitability of a model for its intended purpose.

Section 3.4 (Periodic Model Validation)

Section 3.4 of the Framework describes that MRM shall perform a Model Validation for each model subject to this Framework that is approved for use in production not less than annually (or more frequently as may be contemplated by such Clearing Agency's established risk management framework), including each credit risk model,[24] each liquidity risk model,[25] and each CCP's margin systems and related models,[26] as required by the risk management standards set forth in the Framework. This type of Model Validation is referred to generally in the Framework as ''periodic'' Model Validation. In this regard, for the sake of clarity, the Clearing Agencies would insert the word ''periodic'' as a modifier for Model Validation in the first sentence of the first paragraph of this section.

In addition, the Clearing Agencies would delete a paragraph from this section that states: ''Periodic Model Validations follow full Model Validation standards. In certain cases, MRM may determine extra Model Validation activities are warranted based on previous Model Validation work and findings, changes in market conditions, or because performance monitoring of a particular model warrants extra validation.'' This text would be deleted because, as noted above, the Framework recognizes one definition of Model Validation and the provisions relating to how Model Validation is conducted apply to all models regardless of timing, and it is unnecessary to state that periodic Model Validation follows the same standards as ''full'' Model Validation since there is only one concept of Model Validation. In addition, the reference to extra Model Validation activities is duplicative as the Framework contains other text indicating that Model Validations may be performed for a given model more frequently than on the minimum annual basis.

Section 3.5 (Model Change Management)

Section 3.5 of the Framework describes provisions relating to changes in models. The text of this section refers to a ''version change'' of a model in describing changes to third-party models. The section is intended to apply to any changes to a model and it is unnecessary to modify the word change, including with ''version.'' Therefore, the Clearing Agencies would delete the word ''version'' where it appears before ''change'' in this section.

Section 3.6 (Model Approval and Control)

In addition to the proposed change described above to extend the period allowable for a provisional approval to remain in effect, the Clearing Agencies would revise a sentence in Section 3.6 of the Framework that states: ''Provisional approval requests along with appropriate control measures must be presented by the applicable Model Owner to MRM.'' The sentence as written is duplicative as the first paragraph of Section 3.6 states that models must be submitted to MRM for approval. However, given the focus of this section on the approval of models, the Clearing Agencies believe that the section should more clearly state where the approval authority resides for provisional models. As stated above, it is MRM's responsibility to approve models. Therefore, the Clearing Agencies would revise the sentence described above to read: ''Provisional approval requests along with appropriate control measures must be approved by MRM.''

A sentence that states: ''All new models, and all material changes to existing models, shall undergo Model Validation by MRM and then be approved by MRM prior to business use'' would be revised to replace the word ''then'' with ''must'' to clarify the requirement that a model must be approved by MRM prior to use.

[23] The Clearing Agencies' current grading scale consists of three grades—''A,'' ''B,'' and ''C.'' Any Clearing Agency may add or remove grading levels in its discretion, the parameters of which shall be reflected in written procedures established by such Clearing Agency.

[24] *See* 17 CFR 240.17Ad–22(e)(4)(vii).

[25] *See* 17 CFR 240.17Ad–22(e)(7)(vii).

[26] *See* 17 CFR 240.17Ad–22(e)(6)(vii).

Section 3.7 (Resolution of Model Validation Findings)

Consistent with the proposed change described above to remove the description of a group within the Group Chief Risk Office as a ''unit,'' the Clearing Agencies would revise a reference to ''the Operational Risk Management unit'' to delete the word ''unit'' from this reference. Also, the Clearing Agencies would delete the word ''the'' before ''Operational Risk'' because it would not be grammatically correct when ''unit'' is deleted. In addition, the group name of ''Operational Risk Management,'' as set forth in this reference, would be revised to ''Operational Risk'' to reflect a recent name change of this group from Operational Risk Management to Operational Risk. In connection with this name change, the term ''ORM'' that is used in this section to define ''Operational Risk Management'' would be deleted. Also, in this regard, two subsequent references to ORM in the Framework, which appear in Section 3.7 and Section 4.2, respectively, would be removed and replaced with ''Operational Risk.''

Section 3.8 (Model Performance and Monitoring)

In addition to a change relating to the definition of MRM described above, the Clearing Agencies would revise a footnote in Section 3.8 of the Framework. The footnote 29 describes the role Quantitative Risk Management (''QRM'') performs with respect to the CCPs' margin models. A sentence within the note states that a representative of QRM self-elects as the owner of a margin model. In fact, the CCPs' procedures would require the representative to be appointed as the owner of a model. Therefore, the Clearing Agencies would revise this footnote to reflect that a representative of QRM is appointed as the owner of a model.

This section also contains a statement that MRM is responsible for providing oversight of model performance monitoring activities by setting organizational standards and providing critical analysis for identifying model issues and/or limitations. This statement has a footnote that states the organizational standards apply to DTCC's [27] subsidiaries, as applicable. This footnote is unnecessary because the Framework applies only to the Clearing Agencies and no other subsidiaries of DTCC, and the mention to DTCC's subsidiaries in general is extraneous. Therefore, pursuant to the proposed rule change, the Clearing Agencies would delete this footnote.

Section 3.9 (Backtesting)

Section 3.9 of the Framework contains a description of backtesting performed by the Clearing Agencies. Pursuant to the proposed rule change, this section would be revised to delete references to backtesting performed by DTC and related text, including applicable metrics and thresholds, and a related footnote that describes the designation of DTC account families by DTC Participants for purposes of managing Collateral Monitor and Net Debit Cap. The proposed change would be consistent with the Covered Clearing Agency Standards, which pursuant to Rule 17Ad–22(e)(6) [28] requires certain backtesting to be performed by the CCPs. As indicated above, this rule does not apply to DTC.[29] In this regard, a reference to a backtesting metric (Collateral Group Collateral Monitor Coverage) mentioned in Section 4.2 of the Framework (Escalation) would also be deleted.

Section 4.2 (Escalation)

A paragraph within Section 4.2 of the Framework states: ''On at least a monthly basis, the key metrics identified in Section 3.9 are reviewed by the Market and Liquidity Risk Management unit within the Group Chief Risk Office and reported to the MRC [30] by the group within the Group Chief Risk Office responsible for risk reporting. Threshold breaches will be reviewed by the Managing Directors within the Financial Risk Management area (including the Market and Liquidity Risk Management unit) of the Group Chief Risk Office, and in the case of CFR Coverage breaches by the CCPs and Collateral Group Collateral Monitor Coverage by DTC, escalated to the BRC in accordance with the applicable Risk Tolerance Statement.''

Pursuant to the proposed rule change, first, the reference to a Market and Liquidity Risk Management unit would be revised to reflect only the Market Risk Management unit. Today, the Market Risk Management and Liquidity Risk Management areas are under separate management, and Market Risk Management is the area that performs the review of key metrics described in the paragraph.

Second, the Clearing Agencies would revise the paragraph to remove the parenthetical that states, ''including the Market and Liquidity Risk Management unit,'' after a reference to the Financial Risk Management area's role in the review of threshold breaches of key metrics, as both units are part of Financial Risk Management, and therefore the parenthetical is unnecessary. In this regard, the proposed modification would enhance readability.

Third, the Clearing Agencies would remove the text ''by the group within the Group Chief Risk Office responsible for risk reporting'' as it is unnecessary since it can be inferred that reports would be provided by the group responsible for such reporting.

2. Statutory Basis

The Clearing Agencies believe that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[31] as well as Rules 17Ad–22(e)(4), (e)(6), and (e)(7) thereunder,[32] for the reasons described below.

Section 17A(b)(3)(F) of the Act [33] requires, *inter alia,* that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. As described above, the proposed rule change enhances (i) the Clearing Agencies' ability to complete modifications to a provisionally approved model prior to the performance of a model validation and (ii) the text of the Framework to facilitate clarity for the areas within the Clearing Agencies that perform responsibilities with regard to model risk management and compliance with the Framework. By enhancing the Framework in this regard, the proposed rule change supports the Clearing Agencies' performance of their responsibilities under the Framework, including but not limited to assuring that models developed function as intended to support the Clearing Agencies in identifying, measuring, monitoring, and managing their respective credit exposures, liquidity risks and, as applicable, the maintenance of sufficient margin to cover these risks. In this regard, the proposed rule change would promote the safeguarding of securities and funds which are in the custody or control of the Clearing Agencies or for which they

[27] The Depository Trust & Clearing Corporation (''DTCC'') is the parent company of the Clearing Agencies.

[28] *See* 17 CFR 240.17Ad–22(e)(6).

[29] *See supra* note 8.

[30] MRC refers to the Management Risk Committee of the Boards of Directors of the Clearing Agencies.

[31] 15 U.S.C. 78q–1(b)(3)(F).

[32] 17 CFR 240.17Ad–22(e)(4), (e)(6), and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[33] 15 U.S.C. 78q–1(b)(3)(F).

are responsible, by promoting the ability of the Clearing Agencies to manage credit exposures and liquidity risk that may impact the safeguarding of those funds and securities.

Rules 17Ad–22(e)(4), (e)(6), and (e)(7) under the Act [34] require, *inter alia,* that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage risks associated with its credit risk management models, margin models, and liquidity risk management models, respectively, as applicable. As discussed above, the proposed rule change enhances (i) the Clearing Agencies' ability to complete modifications to a provisionally approved model prior to the performance of a model validation and (ii) the text of the Framework to facilitate clarity for the areas within the Clearing Agencies that perform responsibilities with regard model risk management and compliance with the Framework. By enhancing the Framework in this regard, the proposed rule change supports the Clearing Agencies' performance of their responsibilities under the Framework, including but not limited to assuring that models developed function as intended to support the Clearing Agencies in identifying, measuring, monitoring, and managing their respective credit exposures, liquidity risks and, as applicable, the maintenance of sufficient margin to cover these risks. Therefore, the Clearing Agencies believe that the proposed changes to the Framework are consistent with Rules 17Ad–22(e)(4), (e)(6), and (e)(7).[35]

(B) Clearing Agency's Statement on Burden on Competition

The Clearing Agencies do not believe that the proposed rule change would have any impact, or impose any burden, on competition because the proposed rule change simply modifies the Framework governing the management of model risk by the Clearing Agencies and (a) would not effectuate any changes to the Clearing Agencies' model risk management tools as they apply to their respective Members or Participants and (b) would not have an effect with respect to the obligations of participants utilizing Clearing Agency services.

[34] 17 CFR 240.17Ad–22(e)(4), (e)(6), and (e)(7). References to Rule 17Ad–22(e)(6) and compliance therewith apply to the CCPs only and not to DTC.

[35] *Id.*

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Clearing Agencies have not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

The Clearing Agencies reserve the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [36] and Rule 19b–4(f)(6) thereunder.[37]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[36] 15 U.S.C. 78s(b)(3)(A).

[37] 17 CFR 240.19b–4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2022–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2022–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2022–001 and should be submitted on or before March 17, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03879 Filed 2–23–22; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17344 and #17345; Washington Disaster Number WA–00103]

Administrative Declaration of a Disaster for the State of Washington

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Washington dated 02/15/2022.

Incident: Winter Weather and Flooding.

Incident Period: 01/05/2022 through 01/16/2022.

DATES: Issued on 02/15/2022.

Physical Loan Application Deadline Date: 4/18/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 11/15/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations. The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Lewis.
Contiguous Counties:

Washington: Cowlitz, Grays Harbor, Pacific, Pierce, Skamania, Thurston, Wahkiakum, Yakima.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	2.875
Homeowners without Credit Available Elsewhere	1.438
Businesses with Credit Available Elsewhere	5.660
Businesses without Credit Available Elsewhere	2.830
Non-Profit Organizations with Credit Available Elsewhere	1.875
Non-Profit Organizations without Credit Available Elsewhere	1.875
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	2.830
Non-Profit Organizations without Credit Available Elsewhere	1.875

The number assigned to this disaster for physical damage is 17344 6 and for economic injury is 17345 0.

The State which received an EIDL Declaration # is Washington.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2022–03847 Filed 2–23–22; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice: 11664]

30-Day Notice of Proposed Information Collection: Three (3) Passport Services Information Collections—Application for a U.S. Passport; U.S. Passport Renewal Application for Eligible Individuals; and Application for a U.S. Passport: Corrections, Name Change Within 1 Year of Passport Issuance, and Limited Passport Holders

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995. We are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 30 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to March 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument, and supporting documents to *Passport-Form-Comments@State.gov.* You must include the DS form number (if applicable), information collection title, and the OMB control numbers in the email subject line.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Application for a U.S. Passport.
- *OMB Control Number:* 1405–0004.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services, Office of Program Management and Operational Support (CA/PPT/S/PMO).
- *Form Number:* DS–11.
- *Respondents:* Individuals or Households.
- *Estimated Number of Respondents:* 9,217,667.
- *Estimated Number of Responses:* 9,217,667.
- *Average Time per Response:* 85 minutes.
- *Total Estimated Burden Time:* 13,058,362 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

- *Title of Information Collection:* U.S. Passport Renewal Application for Eligible Individuals.
- *OMB Control Number:* 1405–0020.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services, Office of Program Management and Operational Support (CA/PPT/S/PMO).
- *Form Number:* DS–0082.
- *Respondents:* Individuals or Households.
- *Estimated Number of Respondents:* 6,176,883.
- *Estimated Number of Responses:* 6,176,883.
- *Average Time per Response:* 40 minutes.
- *Total Estimated Burden Time:* 4,117,922 hours per year.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

- *Title of Information Collection:* Application for a U.S. Passport: Corrections, Name Change Within 1 Year of Passport Issuance, And Limited Passport Holders.
- *OMB Control Number:* 1405–0160.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services,

[38] 17 CFR 200.30–3(a)(12).

Office of Program Management and Operational Support (CA/PPT/S/PMO).

• *Form Number:* DS–5504.
• *Respondents:* Individuals or Households.
• *Estimated Number of Respondents:* 138,000.
• *Estimated Number of Responses:* 138,000.
• *Average Time per Response:* 40 minutes.
• *Total Estimated Burden Time:* 92,000 hours.
• *Frequency:* On occasion.
• *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
• Enhance the quality, utility, and clarity of the information to be collected.
• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

A U.S. passport (book and/or card format) is a travel document attesting to one's identity and U.S. nationality pursuant to authorities granted to the Secretary of State by 22 U.S.C. 211a *et seq.,* and Executive Order (E.O.) 11295 (August 5, 1966) for the issuance of passports to U.S. nationals. The issuance of U.S. passports requires the determination of identity, nationality, and entitlement with reference to the provisions of Title III of the Immigration and Nationality Act (INA) (8 U.S.C. 1401–1504), the 14th Amendment to the Constitution of the United States, other applicable treaties, laws, and implementing regulations at 22 CFR parts 50 and 51. The primary purpose for soliciting the information is to establish nationality, identity, and entitlement to the issuance of a U.S. passport, and to properly administer and enforce the laws pertaining to the issuance thereof.

• *1405–0004, DS–11, Application for a U.S. Passport:* The form is used by eligible citizens and non-citizen nationals (hereinafter, collectively referred to as ''nationals'') of the United States who need to apply for a U.S. passport. The specific regulations pertaining to the Application for a U.S. Passport are at 22 CFR 51.20 through 51.28.
• *1405–0020, DS–82, The U.S. Passport Renewal Application for Eligible Individuals:* The form is used by current U.S. passport holders who are eligible to renew their current or recently expired U.S. passport. The specific regulations pertaining to the Application for a U.S. Passport by Mail (*i.e.,* the U.S. Passport Renewal Application for Eligible Individuals) are 22 CFR 51.20 and 51.21.
• *1405–0160, DS–5504, The Application for a U.S. Passport: Corrections, Name Change Within 1 Year of Passport Issuance, And Limited Passport Holders:* The form is used by current U.S. passport holders who are eligible to re-apply for a passport, at no charge if: (a) The passport holder's name has changed within the first year of the issuance of the passport; (b) the passport holder's descriptive information on the data page of the passport is incorrect; (c) the passport holder wishes to obtain a fully valid passport after obtaining a full-fee passport with a limited validity of two years or less. The regulations pertaining to the form are at 22 CFR parts 50 and 51.

The forms have been amended based on a change in Department policy. The Department's new policy permits passport applicants to select the gender marker on their passport without presenting medical documentation. This policy change includes updating forms to add a third gender marker, ''X,'' for applicants identifying as unspecified or another gender identity (in addition to the existing ''M'' and ''F'' gender markers).

Methodology

Passport Services collects information from U.S. citizens and non-citizen nationals when they complete and submit the forms. Passport applicants can either download the forms from the internet or obtain one from an Acceptance Facility/Passport Agency or U.S. embassy/consulate abroad. The DS–11 must be completed and executed at an acceptance facility, passport agency, or U.S. embassy/consulate (if abroad), and submitted with evidence of citizenship and identity. The DS–82 and DS–5504 must be completed, signed, and submitted by mail or in person at an acceptance facility, passport agency, or U.S. embassy/consulate (if abroad). (In July 2021, OMB approved a non-substantial change to add the DS–82 Online Passport Renewal (OPR) which will allow customers to renew their U.S. passport electronically in the near future).

Kevin E. Bryant,

Deputy Director, Office of Directives Management, Department of State.

[FR Doc. 2022–03951 Filed 2–22–22; 11:15 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Youth Access to American Jobs in Aviation Task Force; Notice of Public Meeting

AGENCY: Federal Aviation Administration (FAA), Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the Youth Access to American Jobs in Aviation Task Force (YIATF).

DATES: The meeting will be held on March 31, 2022, from 9:00 a.m.–11:00 a.m. Eastern Time.

Requests for accommodations to a disability must be received by March 17, 2022. Requests to submit written materials to be reviewed during the meeting must be received by March 17, 2022.

ADDRESSES: This meeting will be held virtually. Members of the public who wish to observe the meeting may access the event live on the FAA's Twitter, Facebook and YouTube channels. For copies of meeting minutes along with all other information, please visit the YIATF internet website at *https://www.faa.gov/regulations_policies/rulemaking/committees/documents/index.cfm/committee/browse/committeeID/797.*

FOR FURTHER INFORMATION CONTACT: Ms. Aliah Duckett, Federal Aviation Administration, by email at *S602YouthTaskForce@faa.gov* or phone at 202–267–8361. Any committee-related request should be sent to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

On October 3, 2019, FAA established the Task Force under the Federal Advisory Committee Act (FACA) in accordance with section 602 of the FAA Reauthorization Act of 2018 (Pub. L. 115–254). The Task Force is required by statute to develop and provide independent recommendations and strategies to the FAA Administrator to: (1) Facilitate and encourage high school students in the United States to enroll in and complete career and technical education courses, including science, technology, engineering, and mathematics (STEM), that will prepare them to pursue a course of study related to an aviation career at an institution of higher education, a community college, or trade school; (2) facilitate and encourage these students to enroll in a course of study related to an aviation career, including aviation manufacturing, engineering and maintenance, at an institution of higher education, including a community college or trade school; and (3) identify and develop pathways for students to secure registered apprenticeships, workforce development programs, or careers in the aviation industry of the United States.

The charter was renewed on October 4, 2021.

II. Agenda

At the meeting, the agenda will cover the following topics:

- Welcome/Opening Remarks
- Approval of Previous Meeting Minutes
- Subcommittee Presentations
- Review Draft Recommendations
- Review of Action Items
- Closing Remarks

A detailed agenda will be posted on the YIATF internet website address listed in the **ADDRESSES** section at least 15 days in advance of the meeting. Copies of the meeting minutes will also be available on the YIATF internet website.

III. Public Participation

The meeting will be open to the public and livestreamed. Members of the public who wish to observe the meeting can access the livestream on the FAA social media platforms listed in the **ADDRESSES** section on the day of the event.

The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

The FAA is not accepting oral presentations at this meeting due to time constraints. However, the public may present written statements to the Task Force by providing a copy to the Designated Federal Officer via the email listed in the **FOR FURTHER INFORMATION CONTACT** section.

Angela O. Anderson,

Director, Regulatory Support Division, Office of Rulemaking, Federal Aviation Administration.

[FR Doc. 2022–03886 Filed 2–23–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Leveraged Lending

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled ''Leveraged Lending.''

DATES: Comments must be received by April 25, 2022.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0315, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0315'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period. You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the method set forth in the next bullet. Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' drop down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0315'' or ''Leveraged Lending.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include Agency recommendations, requests, or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the proposed collection of information set forth in this document.

Title: Leveraged Lending.

OMB Control No.: 1557–0315.

Description: On March 22, 2013, the agencies [1] issued guidance to the financial institutions they supervise [2] on how to evaluate and monitor credit risks in leveraged loans, understand the effect of changes in borrowers' enterprise values on credit portfolio quality, and assess the sensitivity of future credit losses to these changes in enterprise values.[3] In regard to the underwriting of such credits, the guidance provides information for financial institutions to consider in assessing whether borrowers have the ability to repay credits when due and whether borrowers have sustainable capital structures, including bank borrowings and other debt, to support their continued operations through economic cycles. The guidance also provides information to financial institutions on the risks and potential impact of stressful events and circumstances on a borrower's financial condition.

The final guidance recommends that financial institutions consider developing: (i) Underwriting policies for leveraged lending, including stress-testing procedures for leveraged credits; (ii) risk management policies, including stress-testing procedures for pipeline exposures; and, (iii) policies and procedures for incorporating the results of leveraged credit and pipeline stress tests into the firm's overall stress-testing framework. While not requirements, these recommended policies qualify as ''collections of information'' as defined in the PRA.

Respondents are financial institutions with leveraged lending activities as defined in the guidance that may develop policies recommended in the guidance.

Title: Guidance on Leveraged Lending.

OMB Control No.: 1557–0315.

Frequency of Response: Annual.

Affected Public: Financial institutions with leveraged lending.

Burden Estimates:

Estimated number of respondents: 29.

Estimated total annual burden: 39,162 hours to build; 49,462 hours for ongoing use.

Total estimated annual burden: 88,624 hours.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the information collection is necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2022–03898 Filed 2–23–22; 8:45 am]

BILLING CODE 4810–33–P

[1] OCC, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation.

[2] For the OCC, the term ''financial institution'' or ''institution'' includes national banks, Federal savings associations, and Federal branches and agencies supervised by the OCC.

[3] 78 FR 17766 (March 22, 2013).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities; Information Collection Renewal; Comment Request; Funding and Liquidity Risk Management

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning renewal of its information collection titled, ''Funding and Liquidity Risk Management.''

DATES: Comments must be received by April 25, 2022.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0244, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0244'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period. You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' drop down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0244'' or ''Funding and Liquidity Risk Management.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov*, please contact the

Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the collection of information set forth in this document.

Title: Funding and Liquidity Risk Management.

OMB Control No.: 1557–0244.

Description: The Interagency Policy Statement on Funding and Liquidity Risk Management [1] (Policy Statement) summarizes the principles of sound liquidity risk management that the Federal banking agencies have issued in the past [2] and, where appropriate, harmonizes these principles with the international statement issued by the Basel Committee on Banking Supervision titled ''Principles for Sound Liquidity Risk Management and Supervision.'' [3] The Policy Statement describes supervisory expectations for all depository institutions including banks, savings associations, and credit unions.

Section 14 of the Policy Statement provides that financial institutions should consider liquidity costs, benefits, and risks in strategic planning and budgeting processes. Significant business activities should be evaluated for liquidity risk exposure as well as profitability. More complex and sophisticated financial institutions should incorporate liquidity costs, benefits, and risks in the internal product pricing, performance measurement, and new product approval process for all material business lines, products, and activities. Incorporating the cost of liquidity into these functions should align the risk-taking incentives of individual business lines with the liquidity risk exposure their activities create for the institution as a whole. The quantification and attribution of liquidity risks should be explicit and transparent at the line management level, and should include consideration of how liquidity would be affected under stressed conditions.

Section 20 of the Policy Statement states that liquidity risk reports should provide aggregate information with sufficient supporting detail to enable management to assess the sensitivity of the institution to changes in market conditions, its own financial performance, and other important risk factors. Institutions also should report on the use and availability of government support, such as lending and guarantee programs, and implications on liquidity positions, particularly since these programs are generally temporary or reserved as a source for contingent funding.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 1,069.

Frequency of Response: On occasion.

Estimated Total Burden Hours: 78,096 hours.

Comments: Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the information collections are necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of the services necessary to provide the required information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2022–03906 Filed 2–23–22; 8:45 am]

BILLING CODE P

[1] 75 FR 13656 (Mar. 22, 2010).

[2] For national banks and Federal savings associations, see the *Comptroller's Handbook on Liquidity.* For state member banks and bank holding companies, see the Federal Reserve's *Commercial Bank Examination Manual* (section 4020), *Bank Holding Company Supervision Manual* (section 4010), and *Trading and Capital Markets Activities Manual* (section 2030). For state non-member banks, see the FDIC's *Revised Examination Guidance for Liquidity and Funds Management* (Trans. No. 2002–01) (Nov. 19, 2001), and Financial Institution Letter 84–2008, *Liquidity Risk Management* (August 2008). For federally insured credit unions, see Letter to Credit Unions No. 02–CU–05, Examination Program Liquidity Questionnaire (March 2002).

[3] Basel Committee on Banking Supervision, ''Principles for Sound Liquidity Risk Management and Supervision,'' September 2008. See *www.bis.org/publ/bcbs144.htm.* Federally insured credit unions are not directly referenced in the principles issued by the Basel Committee.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Group to the Commissioner of Internal Revenue; Charter Renewal

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Charter for the Taxpayer Advocacy Panel Committee (TAP), has been renewed for a two-year period beginning February 16, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Terrie English, Taxpayer Advocacy Panel Director, at *TaxpayerAdvocacyPanel@irs.gov.* For questions about TAP, call the TAP toll-free number, 1–888–912–1227.

SUPPLEMENTARY INFORMATION: Notice is hereby given under section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury to announce the charter renewal for the Taxpayer Advocacy Panel Committee (TAP). The TAP purpose is to provide a taxpayer perspective to the Internal Revenue Service (IRS) on critical tax administrative programs. The TAP shall provide listening opportunities for taxpayers to independently identify suggestions or comments to improve IRS customer service through grass roots outreach efforts, and have direct access to elevate improvement recommendations to the appropriate operating divisions. The TAP shall also serve as a focus group to provide suggestions and/or recommendations directly to IRS management on IRS strategic initiatives.

Dated: February 18, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–03928 Filed 2–23–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Recruitment Notice for the Taxpayer Advocacy Panel: Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice; correction.

SUMMARY: In the **Federal Register** notice that was originally published on February 14, 2022, the language describing International Taxpayers is being replaced with: For these purposes, ''international taxpayers'' are broadly defined to include U.S. citizens working, living, or doing business abroad. All other meeting details remain unchanged.

DATES: February 14, 2022, through April 8, 2022.

FOR FURTHER INFORMATION CONTACT: Lisa Billups at 214–413–6523 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of February 14, 2022, in FR Doc. 2022–03024, on page 8340, the language describing International Taxpayers is being replaced to read:

Notice is hereby given that the Department of the Treasury and the Internal Revenue Service (IRS) are inviting individuals to help improve the nation's tax agency by applying to be members of the Taxpayer Advocacy Panel (TAP). The mission of the TAP is to listen to taxpayers, identify issues that affect taxpayers, and make suggestions for improving IRS service and customer satisfaction. The TAP serves as an advisory body to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the National Taxpayer Advocate. TAP members will participate in subcommittees that channel their feedback to the IRS through the Panel's parent committee.

The IRS is seeking applicants who have an interest in good government, a personal commitment to volunteer approximately 200 to 300 hours a year, and a desire to help improve IRS customer service. As a federal advisory committee, TAP is required to have a fairly balanced membership in terms of the points of view represented. Thus, TAP membership represents a cross-section of the taxpaying public with at least one member from each state, the District of Columbia and Puerto Rico, in addition to one member representing international taxpayers. For these purposes, ''international taxpayers'' are broadly defined to include U.S. citizens working, living, or doing business abroad. Potential candidates must be U.S. citizens, not a current employee of any Bureau of the Treasury Department or have worked for any Bureau of the Treasury Department within the three years of December 1 of the current year and must pass a federal tax compliance check and a Federal Bureau of Investigation criminal background investigation. Applicants who practice before the IRS must be in good standing with the IRS (meaning not currently under suspension or disbarment). Federally registered lobbyists cannot be members of the TAP. The IRS is seeking candidates in the following locations: Alabama, Arkansas, Arizona, California, Colorado, Florida, Iowa, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Maine, Missouri, Mississippi, Montana, North Carolina, North Dakota, New Hampshire, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Wisconsin, and West Virginia. TAP members are a diverse group of citizens who represent the interests of taxpayers, from their respective geographic locations as well as taxpayers overall. Members provide feedback from a taxpayer's perspective on ways to improve IRS customer service and administration of the federal tax system, by identifying grassroots taxpayer issues. Members should have good communication skills and be able to speak to taxpayers about TAP and its activities, while clearly distinguishing between TAP positions and their personal viewpoints.

Interested applicants should visit the TAP website at *www.improveirs.org* for more information about TAP. Applications may be submitted online at *www.usajobs.gov.* For questions about TAP membership, call the TAP toll-free number, 1–888–912–1227 and select prompt 5. Callers who are outside of the U.S. should call 214–413–6523 (not a toll-free call).

The opening date for submitting applications is February 14, 2022, and the deadline for submitting applications is April 8, 2022. Interviews will be held. The Department of the Treasury will review the recommended candidates and make final selections. New TAP members will serve a three-year term starting in December 2022. (Note: Highly ranked applicants not selected as members may be placed on a roster of alternates who will be eligible to fill future vacancies that may occur on the Panel.)

Questions regarding the selection of TAP members may be directed to Lisa Billups, Taxpayer Advocacy Panel, Internal Revenue Service, 1111 Constitution Avenue NW, TA:TAP Room 1509, Washington, DC 20224, or 214–413–6523 (not a toll-free call).

Dated: February 17, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–03852 Filed 2–23–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Agreement for a Social Impact Partnership Project

AGENCY: Department of the Treasury.

ACTION: Notice.

SUMMARY: In accordance with the Social Impact Partnerships to Pay for Results Act (''SIPPRA''), the U.S. Department of the Treasury (''Treasury'') and New York City Mayor's Office of Criminal Justice (''NYC–MOCJ'') have entered into an agreement for a social impact partnership project (the ''Project Grant Agreement'').

SUPPLEMENTARY INFORMATION: The Project Grant Agreement contains the following features:

(1) The outcome goals of the social impact partnership project:

NYC–MOCJ's Cure Violence Pay for Success Project proposes the following outcomes: Reduced shootings, reduced victimization and reduced associated medical (Medicaid) costs. NYC–MOCJ expects the newly funded Cure Violence neighborhoods to experience a 40 percent reduction in gunshot wound hospitalizations each period. If achieved, this reduction would lead to a 40 percent decrease in federal Medicaid spending.

(2) A description of each intervention in the project:

NYC–MOCJ will expand their evidence-based model of violence interruption, the Cure Violence program, to eight new program service areas to reduce shootings and hospitalizations over a five-year span by targeting previously unserved geographies and youth at the highest risk for involvement in violence. The Cure Violence model is a neighborhood-based public health approach to gun violence reduction that seeks to change individual and community attitudes and norms about gun violence. The program relies on the efforts of community-based ''outreach workers'' and ''violence interrupters'' in neighborhoods that are the most vulnerable to gun violence. These workers use their personal relationships, social networks, and knowledge of their communities to dissuade specific individuals and neighborhood residents in general from engaging in violence.

(3) The target population that will be served by the project:

NYC–MOCJ anticipates Cure Violence participants will be between the age of 16 and 24 years of age at the time of the SIPPRA project start date and are at high risk for involvement in violence.

(4) The expected social benefits to participants who receive the intervention and others who may be impacted:

Participants and the community as a whole will receive a range of social benefits. Through the project, participants gain meaningful supportive networks, experience an increase in pro-social behaviors, and a decrease of gun incidents and a decline in violence. Communities in which the Cure Violence model has been implemented experience declines in violence.

(5) The detailed roles, responsibilities, and purposes of each Federal, State, or local government entity, intermediary, service provider, independent evaluator, investor, or other stakeholder:

The Mayor's Office of Criminal Justice. NYC–MOCJ is committed to the Cure Violence approach and to providing upfront funding for all sites in this proposal through City Tax Levy funds. Therefore, the project will not need any private investors. NYC–MOCJ senior staff, contracts, and finance teams will oversee partner and service provider procurement and funding.

Service Providers. NYC–MOCJ contracts with local nonprofit service providers to run Cure Violence initiatives in each catchment area. The service providers are responsible for establishing program office space and implementing the full Cure Violence program model. The five service providers are: Good Shepherd Services/BRAG, BronxConnect/Release the Grip, Getting Out and Staying Out/Stand Against Violence, Jewish Community Council/Operation H.O.O.D, and Man Up!, Inc.

Intermediary. Social Finance will manage the project governance process and will work closely with NYC–MOCJ and Cure Violence service providers to monitor the program's operations, analyze accumulated data, and track the impact of the program on the target population in real-time.

(6) The payment terms, the methodology used to calculate outcome payments, the payment schedule, and performance thresholds:

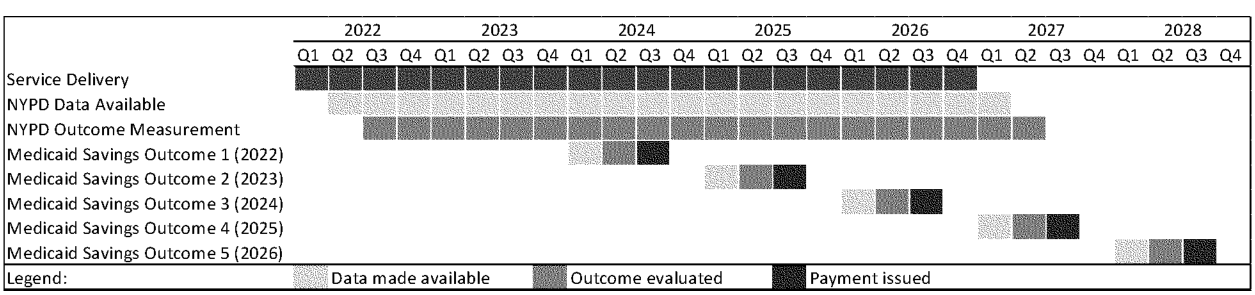
The payments will correspond to the federal share of savings from the anticipated reduction in shooting-related Medicaid expenses in each calendar year of the project (each, an outcome period). Federal value is calculated as the estimated effect size of Cure Violence on emergency treatment and hospitalization for Medicaid-eligible victims of gun violence during each outcome period as compared to 24 comparison sites over the same time period.

(7) The project budget:

PROGRAM SERVICE DELIVERY EXPENSE	Revised Budget (January 14, 2022)
TOTAL ANNUAL EXPENSE for 1 Site	$1,600,000
TOTAL ANNUAL EXPENSE for 8 sites	$12,800,000
TOTAL PROJECT EXPENSE for proposed 8 new sites over 5 year SIPPRA period	$64,000,000

PROGRAM EVALUATION EXPENSE	Revised Budget (January 14, 2022)
TOTAL EVALUATION EXPENSE FOR INDEPENDENT EVALUATOR I (NORC at the University of Chicago)	$1,350,000
TOTAL EVALUATION EXPENSE FOR INDEPENDENT EVALUATOR II (John Jay Research and Evaluation Center)	$1,289,250
TOTAL PROJECT EVALUATION COST	$2,639,250

(8) The project timeline:



(9) The project eligibility criteria: In accordance with the Cure Violence model, eligible program participants should be at high risk for involvement in violence, determined by meeting at least four of the following seven criteria:

• Thought to be a member of a gang known to be actively involved in violence;
• History of criminal activity, including crimes against persons, pending or prior arrests for weapons offenses;
• Thought to have access to a weapon;
• High-risk street activity, thought to be involved in street activity that is highly associated with violence;
• Victim of a recent shooting;
• Recently released from prison for a crime associated with violence; and/or
• Between the ages of 16 and 24.

(10) The evaluation design: The evaluation team will employ a quasi-experimental difference-in-differences evaluation approach.

(11) The metrics that will be used in the evaluation to determine whether the outcomes have been achieved as a result of each intervention and how these metrics will be measured: The evaluators will compare the number of gunshot-wound hospitalizations in the eight sites that receive the Cure Violence intervention, as compared to the comparison sites that do not receive the intervention.

(12) The estimate of the savings to the Federal, State, and local government, on a program-by-program basis and in the aggregate, if the agreement is entered into and implemented and the outcomes are achieved as a result of each intervention:

Federal Savings—$17,595,000
State Savings—$17,595,000

Catherine Wolfram,

Deputy Assistant Secretary for Climate and Energy Economics, Office of Economic Policy.

[FR Doc. 2022–03938 Filed 2–23–22; 8:45 am]

BILLING CODE 4810–AK–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission

ACTION: Notice of open public hearing.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on March 17, 2022 on ''China's Energy Plans and Practices.''

DATES: The hearing is scheduled for Thursday, March 17, 2022, time TBD.

ADDRESSES: This hearing will be held with panelists and Commissioners participating in-person or online via videoconference. Members of the audience will be able to view a live webcast via the Commission's website at *www.uscc.gov.* Also, please check the Commission's website for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Jameson Cunningham, 444 North Capitol Street NW, Suite 602, Washington DC 20001; telephone: 202–624–1496, or via email at *jcunningham@uscc.gov. Reservations are not required to attend the hearing.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Jameson Cunningham via email at *jcunningham@uscc.gov.* Requests for an accommodation should be made as soon as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Background: This is the third public hearing the Commission will hold during its 2022 report cycle. The hearing will begin with an assessment of China's domestic energy system, focusing on key energy and climate-related goals, as well as the institutional and political obstacles China faces in achieving them. Subsequent panels will explore China's energy security and key partnerships with foreign suppliers, as well as the implications of China's energy and climate policies for the United States.

The hearing will be co-chaired by Vice Chair Kim Glas and Commissioner Aaron Friedberg. Any interested party may file a written statement by March 17, 2022 by transmitting to the contact above. A portion of the hearing will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: February 18, 2022.

Daniel W. Peck,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2022–03925 Filed 2–23–22; 8:45 am]

BILLING CODE 1137–00–P

FEDERAL REGISTER

Vol. 87 Thursday,

No. 37 February 24, 2022

Part II

Securities and Exchange Commission

17 CFR Parts 232, 240 and 275

Shortening the Securities Transaction Settlement Cycle; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 240, and 275

[Release Nos. 34–94196, IA–5957; File No. S7–05–22]

RIN 3235–AN02

Shortening the Securities Transaction Settlement Cycle

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') proposes rules to shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade date (''T+2'') to one business day after the trade date (''T+1''). To facilitate a T+1 standard settlement cycle, the Commission also proposes new requirements for the processing of institutional trades by broker-dealers, investment advisers, and certain clearing agencies. These requirements are designed to protect investors, reduce risk, and increase operational efficiency. The Commission proposes to require compliance with a T+1 standard settlement cycle, if adopted, by March 31, 2024. The Commission also solicits comment on how best to further advance beyond T+1.

DATES: Comments should be received on or before April 11, 2022.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number S7–05–22 on the subject line.

Paper Comments

• Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–05–22. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Matthew Lee, Assistant Director, Susan Petersen, Special Counsel, Andrew Shanbrom, Special Counsel, Jesse Capelle, Special Counsel, Tanin Kazemi, Attorney-Adviser, or Mary Ann Callahan, Senior Policy Advisor, Office of Clearance and Settlement at (202) 551–5710, Division of Trading and Markets; Amy Miller, Senior Counsel, at (202) 551–4447, Emily Rowland, Senior Counsel, at (202) 551–6787, and Holly H. Miller, Senior Policy Advisor, at (202) 551–6706, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission proposes rules to shorten the standard settlement cycle to T+1 and improve the processing of institutional trades by broker-dealers, investment advisers, and certain clearing agencies. First, the Commission proposes to amend 17 CFR 240.15c6–1 (''Rule 15c6–1'') to shorten the standard settlement cycle for most broker-dealer transactions from T+2 to T+1 and to repeal the T+4 standard settlement cycle for firm commitment offerings priced after 4:30 p.m.,[1] as discussed in Part III.A. Second, the Commission proposes 17 CFR 240.15c6–2 (''Rule 15c6–2'') to prohibit broker-dealers from entering into contracts with their institutional customers unless those contracts require that the parties complete allocations, confirmations, and affirmations by the end of the trade date, a practice the securities industry has commonly referred to as ''same-day affirmation,'' as discussed in Part III.B. Third, the Commission proposes to amend 17 CFR 275.204–2 (''Rule 204–2'') to require investment advisers that are parties to contracts under Rule 15c6–2 to make and keep records of their allocations, confirmations, and affirmations described in Rule 15c6–2, as discussed in Part III.C. Fourth, the Commission proposes 17 CFR 240.17Ad–27 (''Rule 17Ad–27'') to require a clearing agency that is a central matching service provider (''CMSP'') to establish policies and procedures to facilitate straight-through processing, as discussed in Part III.D. To assess and manage the potential impact of a T+1 settlement cycle, the Commission is also soliciting comment on the following Commission rules and regulations: Regulation SHO; the financial responsibility rules for broker-dealers; requirements in 17 CFR 240.10b–10 (''Rule 10b–10''); and requirements related to prospectus delivery. The Commission proposes to require compliance with each of the proposed rules and rule amendments by March 31, 2024. The Commission solicits comment on this proposed compliance date in Part III.F.

In addition, accelerating beyond a T+1 settlement cycle to a same-day standard settlement cycle (*i.e.,* settlement no later than the end of trade date, or ''T+0'') is an objective that the Commission is actively assessing; however, the Commission is not proposing rules to require a T+0 standard settlement cycle at this time. In Part IV, the Commission discusses and requests comment regarding potential pathways to T+0, as well as certain challenges to implementing T+0 that have been identified by market participants. The comments received will be used to inform any future action to further shorten the settlement cycle beyond T+1.

Table of Contents

[1] *See infra* Part III.A, notes 83–85, and accompanying text (discussing the types of securities to which Rule 15c6–1 applies, which includes equities, corporate bonds, unit investment trusts (''UITs''), mutual funds, exchange-traded funds (''ETFs''), American Depositary Receipts (''ADRs''), security-based swaps, and options).

Statutory Authority and Text of the Proposed Rules and Rule Amendments

I. Introduction

In the 1920s, capital markets maintained a one-day settlement cycle for transactions in securities.[2] Over the course of the twentieth century, the length of the settlement cycle grew to five days—a response to the ever-growing number of investors, the rising volume of transactions, and the increasing complexity of the processing infrastructure necessary to facilitate the settlement of those transactions.[3] Since the late 1980s, the Commission, seeking to protect investors and reduce risk, has been working with the securities industry to minimize the time it takes for securities transactions to settle. The first initiative to shorten the standard settlement cycle emerged following studies by government and industry groups after the October 1987 market break, including the Report of the Bachmann Task Force on Clearance and Settlement Reform in U.S. Securities Markets.[4] The Bachmann Report presented multiple recommendations to improve the securities market by improving the safety and soundness of the National C&S System.[5] The Bachmann Report, submitted to the Commission in May 1992, recommended that by 1994 the Commission shorten the standard settlement cycle from five days to three days.

To support its recommendation, the Bachmann Report used the concept ''time equals risk'' to illustrate that ''less time between a transaction and its completion reduces risk.''[6] In addition, the report stated that a ''shorter settlement cycle will also uncover potential problems sooner, before they mushroom or begin to cascade throughout the industry.''[7] In recommending that the Commission shorten the standard settlement cycle, the Bachmann Report also stated, ''[t]he system and legal initiatives necessary to accomplish the T+3 settlement for corporate and municipal securities should serve as a stepping stone to further reductions in settlement periods over time as technology and systems permit.''[8]

In 1993, the Commission adopted Rule 15c6–1 to shorten this process by requiring the settlement of most securities transactions within three business days (''T+3''),[9] and in 2017, the Commission amended the rule to require settlement within two business days (''T+2'').[10] The Commission believes that further shortening of the settlement cycle would promote investor protection, reduce risk, and increase operational efficiency. This view has been informed by two recent episodes of increased market volatility—in March 2020 following the outbreak of the COVID–19 pandemic, and in January 2021 following heightened interest in certain ''meme'' stocks.

[2] *See* Kenneth S. Levine, Was Trade Settlement Always on T+3? A History of Clearing and Settlement Changes, Friends of Financial History No. 56, at 20, 22 (Summer 1996), *https://archive.org/details/friendsoffinanci00muse_12/page/20/mode/2up?view=theater.*

[3] *See* Levine, *supra* note 2, at 23–25.

[4] *See* Report of the Bachmann Task Force on Clearance and Settlement Reform in U.S. Securities Markets, Submitted to The Chairman of the U.S. Securities and Exchange Commission (May 1992) (''Bachmann Report''), *https://www.govinfo.gov/content/pkg/FR-1992-06-22/pdf/FR-1992-06-22.pdf.* The task force was headed by John W. Bachmann, the Managing Principal of Edward D. Jones & Co. of St. Louis, Missouri. The recommendations in the Bachmann Report were intended to help inform the Commission's approach to considering reforms of the national system for clearance and settlement (''National C&S System'').

[5] *See id.*

[6] *See id.* at 4. Specifically, the concept posits that the length of time between the execution and settlement of a securities transaction correlates to the financial risk exposure inherent in the transaction, and that shortening this length of time can reduce the overall risk exposure.

[7] *Id.*

[8] *Id.* at 6.

[9] Exchange Act Release No. 33023 (Oct. 6, 1993), 58 FR 52891 (Oct. 13, 1993) (''T+3 Adopting Release''). In adopting Rule 15c6–1, the Commission set a compliance date of June 1, 1995.

[10] Exchange Act Release No. 80295 (Mar. 22, 2017), 82 FR 15564, 15601 (Mar. 29, 2017) (''T+2 Adopting Release'').

These two episodes have highlighted potential vulnerabilities in the U.S. securities market that shortening the standard settlement cycle could help mitigate.[11] Accordingly, the Commission is proposing a transition to a T+1 standard settlement cycle. The Commission also believes that achieving settlement by the end of trade date (''T+0'') could benefit investors as well.[12] While the Commission is not proposing a T+0 standard settlement cycle at this time, the Commission would like to better understand the challenges that market participants may need to address and resolve to achieve T+0. Accordingly, the Commission solicits comments on potential paths to and challenges associated with achieving a T+0 standard settlement cycle in Part IV.[13]

On December 1, 2021, the Depository Trust and Clearing Corporation (''DTCC''),[14] the Investment Company Institute (''ICI''),[15] the Securities Industry and Financial Markets Association (''SIFMA''),[16] and Deloitte & Touche LLP (''Deloitte'') [17] published a report that presented industry recommendations to implement a T+1 standard settlement cycle in the U.S.[18] The Commission has considered the potential requirements, benefits, and costs associated with further shortening the standard settlement cycle in the U.S., and proposes to require that the standard settlement cycle transition to T+1, if adopted, by March 31, 2024.[19] As the securities industry considers how it would implement T+1, the Commission believes that market participants also generally should consider investments in new technology or operations now that can be effective over the long term at maximizing the benefits of risk reduction and improved efficiency in post-trade processing that accompany shortening the settlement cycle, mindful of efforts to shorten the settlement cycle beyond T+1.

In Part II, the Commission provides (i) a history of the key Commission and industry efforts to shorten the standard settlement cycle, including past concerns related to T+1 and T+0 settlement cycles, (ii) an overview of the current state of post-trade processing in the market for U.S. equity securities, and (iii) a summary of other recent market events related to this rule proposal. In Part III, the Commission describes the rule proposals that are necessary to achieve T+1. In Part IV, the Commission discusses the potential pathways and challenges associated with implementing a standard T+0 settlement cycle and requests comment on any and all aspects of achieving T+0.

II. Background

In developing the rule proposals included in this release, the Commission considered the history related to shortening the standard settlement cycle, the current state of post-trade processing in the U.S. equities market, and recent initiatives and market events that have focused attention in the securities industry and the public on the appropriate length of the standard settlement cycle. Each of these is discussed further below.

A. Relevant History

The first industry-level engagement on T+1 began in the late 1990s and developed a business case for using straight-through processing to achieve T+1,[20] estimating that an industry investment of $8 billion in improved settlement technologies and processes could reduce settlement exposures by 67% and return $2.7 billion in annual savings. Implementation of the building blocks described in the Securities Industry Association (''SIA'') Business Case Report was postponed when improving operational resilience following the terrorist attacks of September 11, 2001 took priority,[21] although many of them were subsequently achieved.

In 2012, DTCC commissioned a new study that found moving to a T+2 settlement cycle would be significantly less costly and take less time to implement than either an immediate or gradual transition to T+1, while still delivering significant benefits with respect to reducing risks and costs.[22] The BCG Study ruled out as infeasible at the time a settlement cycle with settlement on trade date (*i.e.,* T+0) ''given the exceptional changes required to achieve it and weak support across the industry.'' [23] It concluded that a T+0 settlement cycle would face major challenges with processes such as trade reconciliation and exception management, securities lending, and transactions with foreign counterparties (especially where time zones are least aligned). It also concluded that payment systems used for final settlement would need to be significantly altered to enable transactions late in the day. The BCG Study noted that market participants were aware that a T+2 settlement cycle could be accomplished through mere compression of timeframes and corresponding rule changes but that implementing T+2 without certain building blocks would limit the amount of savings that would be realized across the industry.

[11] *See, e.g.,* Staff Report on Equity and Options Market Structure Conditions in Early 2021 (Oct. 14, 2021), *https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf.* This report represents the views of Commission staff. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This report, like all staff reports, has no legal force or effect: It does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[12] In this release, the Commission uses ''T+0'' to refer to a settlement cycle that is complete by the end of the day on which the trade was executed (''trade date''). This is sometimes referred to as ''same-day'' settlement and is distinct from real-time settlement, which contemplates settlement in real time or near real time (*i.e.,* immediately following trade execution) on a gross basis. *See infra* Part IV (further discussing the concept of ''T+0'' as used in this release, as well as the related concepts of real-time settlement and rolling settlement, where trades are netted and settled intraday on a recurring basis).

[13] Part IV discusses potential paths to and challenges associated with implementing a T+0 settlement cycle. For example, activities that are linked to the length of the settlement cycle include securities lending activities. *See infra* Part IV.B.6.

[14] DTCC is the holding company for three registered clearing agencies: The Depository Trust Company (''DTC''), the National Securities Clearing Corporation (''NSCC''), and the Fixed Income Clearing Corporation (''FICC''). It is also the holding company for DTCC ITP Matching (US) LLC (''DTCC ITP Matching''), which operates a CMSP pursuant to an exemption from registration as a clearing agency.

[15] ICI is an association representing regulated funds globally, including mutual funds, ETFs, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide.

[16] SIFMA is a trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets.

[17] *See infra* note 18.

[18] Deloitte, DTCC, ICI, & SIFMA, Accelerating the U.S. Securities Settlement Cycle to T+1 (Dec. 1, 2021) (''T+1 Report''), *https://www.sifma.org/wp-content/uploads/2021/12/Accelerating-the-U.S.-Securities-Settlement-Cycle-to-T1-December-1-2021.pdf. See infra* Part II.C (summarizing the recommendations in the T+1 Report).

[19] *See infra* Part III.F (discussing the proposed compliance date). The T+1 Report contemplates implementation of T+1 in the first half of 2024, and the Commission believes that sufficient time is available to achieve T+1 by March 31, 2024, as discussed further in Part III.F.

[20] The term ''straight-through processing'' generally refers to processes that allow for the automation of the entire trade process from trade execution through settlement without manual intervention. *See infra* Part III.D.1 (further discussing the concept of straight-through processing).

[21] *See* SIA, T+1 Business Case Final Report (July 2000) (''SIA Business Case Report''), *https://www.sifma.org/wp-content/uploads/2017/05/t1-business-case-final-report.pdf.*

[22] *See* The Boston Consulting Group (''BCG''), Cost Benefit Analysis of Shortening the Settlement Cycle (Oct. 2012) (''BCG Study''), *https://www.dtcc.com/~/media/Files/Downloads/WhitePapers/CBA_BCG_Shortening_the_Settlement_Cycle_October2012.pdf.*

[23] *Id.* at 9.

The BCG Study further concluded that moving to a T+1 settlement cycle would require new infrastructure to enable near real-time trade processing and would also require transforming the securities lending and foreign buyer processes.[24]

In 2014, DTCC, ICI, SIFMA, and other market participants formed an Industry Steering Group (''ISG'') to facilitate a transition to T+2.[25] The ISG and PricewaterhouseCoopers LLP published a white paper describing certain ''industry-level requirements'' and ''sub-requirements'' that the ISG believed would be required for a successful migration to a T+2 settlement cycle.[26] In conjunction with the ISG, Deloitte published in December 2015 a ''T+2 Playbook'' setting forth the requested implementation timeline with milestones and dependencies, as well as detailing ''remedial activities'' that impacted market participants should consider to prepare for migration to T+2.[27] The ISG White Paper also included an implementation timeline that targeted the transition for the end of the third quarter of 2017.

In 2015, the Commission's Investor Advisory Committee recommended that the Commission pursue T+1 (rather than T+2), noting that retail investors would significantly benefit from a T+1 standard settlement cycle.[28] In the event that the Commission determined to pursue a T+2 standard settlement cycle, the IAC recommended that the Commission work with industry participants to create a clear plan for moving to T+1 shortly thereafter.[29]

The Commission amended Rule 15c6–1 in 2017 to shorten the standard settlement cycle from T+3 to T+2 and set a compliance date for September 2017.[30] The Commission recognized that the clearance and settlement process for securities transactions encompassed by the rule involved a number of market participants and entities whose functions and capabilities would be impacted significantly by a change in the standard settlement cycle, and the Commission considered these in its analysis supporting the move to T+2. Among these entities were the NSCC and the DTC, which respectively operate the central counterparty (''CCP'') and central securities depository (''CSD'') for transactions in U.S. equity securities,[31] three CMSPs,[32] and the diverse population of market participants that depend on the clearance and settlement services provided by NSCC, DTC, and the CMSPs. These market participants include but are not limited to, retail and institutional investors, registered investment advisers, broker-dealers, exchanges, alternative trading systems, service providers, and custodian banks.

In the T+2 Adopting Release, the Commission explained that a T+1 standard settlement cycle could produce greater reductions in market, credit, and liquidity risk for market participants than a move to T+2, but that shortening beyond T+2 would require significantly larger investments in new systems and processes.[33] In an effort to analyze, among other things, the impacts of further shortening beyond T+2, the Commission directed Commission staff to study the issue.[34] As a result of the staff's study and analysis of the settlement cycle, the Commission believes that, among other things, improvements to institutional trade processing are critical to promoting the operational efficiency necessary to facilitate a standard settlement cycle shorter than T+2, as discussed further in Part III.B below.

B. Current State of Post-Trade Processing

In the T+2 Proposing Release, the Commission provided a detailed overview of post-trade processing for transactions in equity securities, including the roles of the CCP, the CSD, and CMSPs.[35] The Commission also provided a summary of the affected market participants—investors, broker-dealers, prime broker-dealers (''prime brokers''), and custodian banks—and described at a high level the different paths to settlement available depending on whether a transaction involves a retail or institutional investor.[36] While this overview remains an accurate summary of the post-trade process, the Commission recognizes that shortening the standard settlement cycle beyond T+2 will require particular focus on improving institutional trade processing.

To provide context for understanding the Commission's rule proposals and the related economic analysis that follows in this release, the Commission provides below an overview of the current state of post-trade processing, including a brief summary of trade flows relevant to the processing of institutional trades. As a general matter, investors often rely on securities intermediaries to facilitate the clearance and settlement of their securities transactions. These intermediaries include broker-dealers, which maintain a securities account on the investor's behalf to facilitate purchases and sales of securities, and clearing agencies, which provide a range of services designed to facilitate the clearance and settlement of a securities transaction. As relevant to this release, a clearing agency may act as a CCP, a CSD, or a CMSP. The role of each of these entities is explained further below.

1. Clearing Agencies—CCPs, CSDs, and CMSPs

As explained more fully in the T+2 Proposing Release,[37] a CCP interposes itself between the counterparties to a trade following trade execution, becoming the buyer to each seller and seller to each buyer to ensure the performance of open contracts. One critical function of a CCP is to eliminate bilateral credit risk between individual buyers and sellers. NSCC is a registered

[24] *Id.*

[25] *See* Press Release, DTCC, Industry Steering Committee and Working Group Formed to Drive Implementation of T+2 in the U.S. (Oct. 16, 2014), *http://www.dtcc.com/news/2014/october/16/ust2.aspx.*

[26] PricewaterhouseCoopers LLP & ISG, Shortening the Settlement Cycle: The Move to T+2 (June 2015) (''ISG White Paper''), *http://www.ust2.com/pdfs/ssc.pdf.* This release uses ''ISG'' rather than ''ISC'' (''Industry Steering Committee,'' the term used in the ISG White Paper) when referring to the T+2 effort so that this release clearly distinguishes between the ISC's current work on T+1, as reflected in the T+1 Report, *supra* note 18, from past work on T+2.

[27] Deloitte & ISG, T+2 Industry Implementation Playbook (Dec. 18, 2015) (''T+2 Playbook''), *http://www.ust2.com/pdfs/T2-Playbook-12-21-15.pdf.*

[28] Investor Advisory Committee (''IAC''), U.S. Securities and Exchange Commission, Recommendation of the Investor Advisory Committee: Shortening the Settlement Cycle in U.S. Financial Markets (Feb. 12, 2015), *https://www.sec.gov/spotlight/investor-advisory-committee-2012/settlement-cycle-recommendation-final.pdf.*

[29] *Id.*

[30] T+2 Adopting Release, *supra* note 10; *see also* Exchange Act Release No. 78962 (Sept. 28, 2016), 81 FR 69240 (Oct. 5, 2016) (''T+2 Proposing Release'').

[31] NSCC and DTC are subsidiaries of DTCC and each a clearing agency registered with the Commission. *See supra* note 14.

[32] *See* Order Granting Exemption from Registration as a Clearing Agency for Global Joint Venture Matching Services—U.S., LLC, Exchange Act Release No. 44188 (Apr. 17, 2001), 66 FR 20494, 20501 (Apr. 23, 2001); Order Approving Applications for an Exemption from Registration as a Clearing Agency for Bloomberg STP LLC and SS&C Techs., Inc., Exchange Act Release No. 76514 (Nov. 24, 2015), 80 FR 75388, 75413 (Dec. 1, 2015) (''BSTP and SS&C Order''). In the T+2 Adopting Release, the Commission also referred to these entities as ''matching and electronic trade confirmation service providers.'' T+2 Adopting Release, *supra* note 10, at 15566.

[33] T+2 Adopting Release, *supra* note 10, at 15582.

[34] *Id.* at 15582–83.

[35] T+2 Proposing Release, *supra* note 30, at 69243–46.

[36] As in the T+2 Proposing Release, the distinction between ''retail investor'' and ''institutional investor'' is made only for the purpose of illustrating the manner in which these types of entities generally clear and settle their securities transactions.

[37] T+2 Proposing Release, *supra* note 30, at 69243.

clearing agency that provides CCP services for transactions in U.S. equity securities to its members.[38] NSCC facilitates the management of risk among its members using a number of tools, which include: (1) Novating and guaranteeing trades to assume the credit risk of the original counterparties; (2) collecting clearing fund contributions from members to help ensure that NSCC has sufficient financial resources in the event that one of the counterparties defaults on its obligations; [39] and (3) netting to reduce NSCC's overall exposure to its counterparties.[40]

As discussed further in Part V.B.1, CCP netting reduces risk in the settlement process by reducing the overall number of obligations that must be settled. NSCC's netting and accounting system is called the Continuous Net Settlement System (''CNS''). NSCC accepts trades into CNS for clearing from the nation's exchanges and other trading venues, and it uses CNS to net each NSCC member's trades in each security traded that day to a single position for each security, either long (*i.e.,* the right to receive securities) or short (*i.e.,* an obligation to deliver securities). Throughout the day, NSCC records cash debit and credit data generated by its members' activities, and at the end of the processing day, NSCC nets the debits and credits to produce one aggregate cash debit or credit for each member.[41]

While NSCC provides final settlement instructions to its members each day, the payment for and transfer of securities ownership occurs at DTC, which serves as the CSD and settlement system for U.S. equity securities. At the conclusion of each trading day, an NSCC member's short and long positions are compared against its corresponding DTC account to determine whether securities are available for settlement. If securities are available, they will be transferred to cover the NSCC member's short positions. Specifically, on settlement date NSCC submits instructions to DTC to deliver (*i.e.,* transfer) securities positions for each security netted through CNS to each NSCC member holding a long position in such securities. Cash obligations are settled through DTC by one net payment for each NSCC member at the end of the settlement day.[42]

As noted above, DTC is a CSD, which is an entity that holds securities for its participants either in certificated or uncertificated (*i.e.,* immobilized or dematerialized) form so that ownership can be easily transferred through a book entry (rather than the transfer of physical certificates) and provides central safekeeping and other asset services. Additionally, a CSD may operate a securities settlement system, which is a set of arrangements that enables transfers of securities, either for payment or free of payment, and facilitates the payment process associated with such transfers. DTC serves as the CSD and settlement system for most U.S. equity securities, providing custody and book-entry services.[43] In accordance with its rules, DTC accepts deposits of securities from its participants, credits those securities to the depositing participants' accounts, and effects book-entry transfer of those securities. DTC substantially reduces the number of physical securities certificates transferred in the U.S. markets, which significantly improves operational efficiencies and reduces risk and costs associated with the processing of physical securities certificates.

In addition to a securities account at DTC, each DTC participant has a settlement account at a clearing bank to record any net funds obligation for end-of-day settlement. Debits and credits in the participant's settlement account are netted intraday to calculate, at any time, a net debit balance or net credit balance, resulting in an end-of-day settlement obligation or right to receive payment. DTC nets debit and credit balances for participants who are also members of NSCC to reduce fund transfers for settlement, and acts as settlement agent for NSCC in this process. Settlement payments between DTC and DTC's participants' settlement banks are made through the National Settlement Service (''NSS'') of the Federal Reserve System.[44]

CMSPs electronically facilitate communication among a broker-dealer, an institutional investor or its investment adviser, and the institutional investor's custodian to reach agreement on the details of a securities trade.[45] These entities emerged as a result of efforts by market participants to develop a more efficient and automated matching process that continues to be viewed as a necessary step in achieving straight-through processing for the settlement of institutional trades.

CMSPs provide the communication facilities to enable a broker-dealer and an institutional investor to send messages back and forth that results in the agreement of the trade details, generally referred to as an ''affirmation'' or ''affirmed confirmation,'' which is then sent to DTC to effect settlement of the trade.[46] In general, the formatting and content of messages used to communicate confirmations and affirmations varies and may include use of, for example, SWIFT, FIX, ISITC, or other formats. The delivery method of such messages also may vary across market participants. The CMSP, by acting as a centralized hub, helps promote standardization and facilitate communication.

In addition, a CMSP may offer a ''matching'' process by which it compares and reconciles the broker-dealer's trade details with the institutional investor's trade details to determine whether the two descriptions of the trade agree, at which point it can generate an affirmation to effect settlement of the trade. As part of such process, the CMSP may offer services that can assist with the automated identification of trades that do not match, allowing market participants to identify errors and remediate any trade information that does not match.

[38] As discussed further in the T+2 Proposing Release, NSCC also provides CCP services for other types of securities, including corporate bonds, municipal securities, and UITs. *Id.*

[39] Commission rules require a covered clearing agency that provides CCP services to have policies and procedures reasonably designed to maintain financial resources that cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the participant family that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions. *See* 17 CFR 240.17Ad–22(e)(4)(iii).

[40] These functions are discussed in more detail in the T+2 Proposing Release. *See* T+2 Proposing Release, *supra* note 30, at 69243. Since publication of the T+2 Proposing Release, NSCC has amended its rules to provide a trade guarantee as soon as NSCC has validated the trade upon submission for clearing.

[41] The operation of CNS is explained more fully in the T+2 Proposing Release. *See id.* at 69244.

[42] The interaction between NSCC and DTC to achieve settlement is explained more fully in the T+2 Proposing Release. *See id.* at 69245.

[43] DTC's role as CSD is discussed more fully in the T+2 Proposing Release. *See id.* at 69245–46. As of 2017, DTC retained custody of more than 1.3 million active securities issues valued at $54.2 trillion, including securities issued in the U.S. and 131 other countries and territories. *See* DTCC, Businesses and Subsidiaries: The Depository Trust Company (DTC), *https://www.dtcc.com/about/businesses-and-subsidiaries/dtc.* The corporate bond market accounted for another $30 billion and the municipal bond market saw over $10 billion on average traded every day in 2016. *See* SIFMA, T+2 Fact Sheet, *https://www.sifma.org/wp-content/uploads/2017/09/Sep-8-T2-Update-Fact-Sheet.pdf.*

[44] The relevance of NSS to achieving money settlement in a T+0 environment is discussed in Part IV.B.3.

[45] The role of the CMSP in facilitating settlement is discussed more fully in the T+2 Proposing Release. *See* T+2 Proposing Release, *supra* note 30, at 69246.

[46] Specifically, the CMSP will send the affirmed confirmations to DTC where the DTC participants, who will deliver the securities, will authorize the trades for automated settlement.

2. Broker-Dealers

Broker-dealers are securities intermediaries that, among other things, may hold accounts on behalf of investors to facilitate the purchase and sale of securities transactions. Broker-dealers that are direct members of clearing agencies are typically referred to as ''clearing brokers.'' Clearing brokers must comply with the rules of the clearing agency, including but not limited to rules for operational and financial requirements.[47] Broker-dealers that submit transactions to a clearing agency through a clearing broker are typically referred to as ''introducing brokers.'' In general, broker-dealers executing trades on a registered securities exchange are required to clear those transactions through a registered clearing agency. Broker-dealers executing trades outside the auspices of a trading venue (*e.g.,* on an internalized basis) may clear through a clearing agency or may choose to settle those trades through mechanisms internal to that broker-dealer.

3. Retail and Institutional Investors

As discussed in the T+2 Proposing Release, institutional investors are entities such as, but not limited to, pension funds, mutual funds, hedge funds, bank trust departments, and insurance companies.[48] Transactions involving institutional investors are often more complex than those for and with retail investors due to the volume and size of the transactions, the entities involved in facilitating the execution and settlement of the trade, including CMSPs, bank custodians, or prime brokers, and the need to manage certain regulatory or business obligations.[49] By contrast, the settlement of retail investor trades generally occurs directly with the investor's broker-dealer,[50] without relying on a separate custodian bank or prime broker.

Institutional investors may choose to trade through an executing broker-dealer that clears and settles its securities transactions using NSCC and DTC. However, depending on the size and complexity of the trade and the number of trading partners involved in the transaction, institutional investors may also choose to avail themselves of processes specifically designed to address the unique aspects of their trades. Specifically, as described below, many institutional trades settle on an allocated trade-for-trade basis through a custodian bank. Many hedge funds settle their trades using prime brokers.

Below are diagrams that illustrate at a high level the typical path to settlement for retail trades and institutional trades.

(a) Retail Trades

In general, individual retail investors rely on their broker-dealers to execute trades on their behalf as customers of their broker-dealers. As previously discussed, a broker-dealer may choose to internalize a customer's order using its own inventory of securities. However, the broker-dealer may also take other steps, away from its customer, to deliver securities to its customer's account. Depending on how the broker-dealer executes such trades away from its customer, these other trades may clear through a clearing agency or may settle bilaterally.

Retail investors may engage in ''self-directed'' trading. Figure 1 illustrates, at a high level, the activities that take place for a self-directed retail trade. In this scenario, when a retail investor places an order to trade with its counterparty, the counterparty—typically, the broker-dealer through which the retail investor holds its securities account—will execute the trade. The counterparty will issue a trade confirmation identifying certain trade details, such as the transaction type, the account information, the security and quantity of shares traded, the trade and settlement dates, and the net amount of money to be received or paid at settlement.[51] The confirmation may also include other financial details, such as commissions, taxes, and fees. A retail investor generally would review the information provided in the confirmation and contact its broker-dealer to correct any errors. In the absence of errors, the broker-dealer can proceed with settlement processing.

BILLING CODE 8011–01–P

[47] The requirements for membership or participation established by the clearing agencies are discussed more fully in the T+2 Proposing Release. *See* T+2 Proposing Release, *supra* note 30, at 69247.

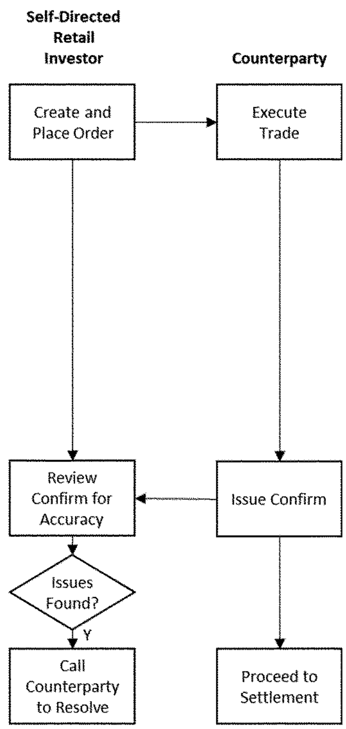
[48] Institutional investors also include employee-benefit plans, foundations, endowments, insurance companies and registered investment companies (''RICs'') (of which mutual funds are one type), among other investor types.

[49] *See* T+2 Proposing Release, *supra* note 30, at 69247 (discussing the same).

[50] As previously discussed, if the broker-dealer is an introducing broker-dealer, the broker-dealer may use a clearing broker-dealer to facilitate clearance and settlement. *See id.* (discussing the same).

[51] *See infra* Part III.B.1 (further discussing trade confirmations and distinguishing the requirements with respect to a confirmation under existing Rule 10b–10 and a confirmation under proposed Rule 15c6–2).

Figure 1. *Trade processing from the perspective of a self-directed retail investor.*



In some instances, self-directed retail trades and trades directed by an investment adviser are executed together as part of a block trade initiated by an investment adviser, which could also engage the use of a CMSP to communicate the allocations of the block trade to participating accounts.[52] Further discussion of institutional trades and the use of block trades by institutional investors follows below.

(b) Institutional Trades

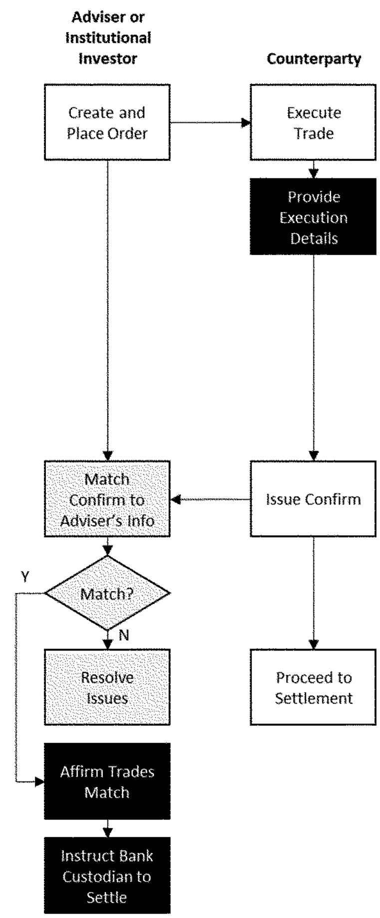
Institutional investors often engage a broker-dealer or another counterparty for trade execution, and separately, a bank custodian to provide custodial safekeeping and asset servicing for their investments.[53] Because the counterparty and the custodian are different entities in this scenario, additional steps are necessary to complete the post-trade process, as identified by the black shapes in Figure 2. Specifically, the institutional investor or its investment adviser will need to instruct the bank custodian on the details of each transaction and authorize the bank custodian to settle the trade. The black shapes in Figure 2 also illustrate how the investor's counterparty generally will provide the institutional investor or investment adviser with execution details prior to issuing a trade confirmation.[54]

[52] *See supra* Part II.B.1 (discussing the services provided by a CMSP); *infra* Part II.B.3.c) (discussing block trades).

[53] Some institutional investors use broker-dealers to custody their securities, and in such cases their transactions will trade and settle as described in Figure 1. In this release, we have grouped such circumstances under the retail investor scenario because of the similar transaction flow.

[54] An electronic copy of the execution details is sometimes referred to as a ''notice of execution.''

Figure 2. *Trade processing from the perspective of an institutional investor or its investment adviser without the use of a CMSP.*



Institutional investors, along with their broker-dealers and bank custodians, may rely on the services of a CMSP to transmit confirmations and affirmations or match the trade details to prepare a trade for settlement. Alternatively, they may use other standardized messaging protocols, such as FIX and SWIFT,[55] to communicate trade information. Some market participants, however, still rely on manual processes to communicate trade information, such as through the use of fax machines or email, and may use Excel data files rather than standardized data protocols.[56] Whichever the mechanism, achieving an affirmed confirmation by the end of trade date is considered a securities industry best practice.[57] According to data from DTCC, however, only 68% of trades are affirmed on trade date.[58] Figure 2 illustrates a scenario where the institutional investor does not rely on a CMSP to complete the confirmation/affirmation process.

For some institutional investors, such as hedge funds, a prime broker may act as both the counterparty to the trade and the custodian of the securities. In this scenario, the institutional investor or its investment adviser provides trade details to the prime broker, and the prime broker will affirm the transaction to facilitate settlement. As a broker-dealer, the prime broker may also use NSCC to clear the transaction. Generally, the Commission understands that the prime broker will ''disaffirm'' a transaction if the institutional investor does not make margin payments required of the investor by the prime broker.

(c) Use of Block Trades

Investment advisers commonly trade in ''blocks'' to manage the accounts of their institutional clients. In such a scenario, investment advisers aggregate the orders of multiple clients into a block for trade execution. After trade execution of the block order by the broker-dealer, the investment adviser

[55] *See* T+1 Report, *supra* note 18, at 5.

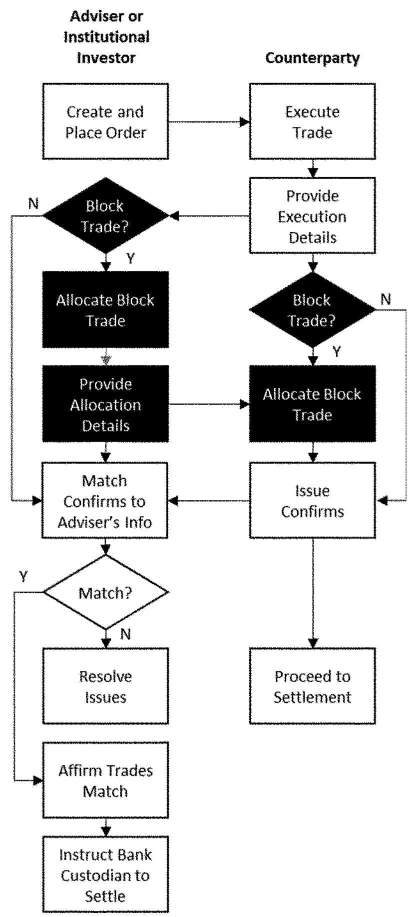
[56] Protocols are the rules that govern the exchange or transmission of data and may refer to the specific content and formatting of trade information (*i.e.,* ISO15022, FIX, SWIFT or an Excel template), the method for delivery trade information (*i.e.,* file transfer protocol (FTP), SSH file transfer protocol (SFTP), SWIFT, DTC ITP, email, etc.), or both. They may also refer to the frequency of transmission, deadlines for data delivery, and whether data is sent for individual trades or a group (or ''batch'') of trades. Some delivery mechanisms may offer a hub-and-spoke model for delivery, in which the sender delivers data to a central hub and the hub passes the data on to identified recipients. Other delivery mechanisms are bi-lateral, in which the sender and receiver have a direct communication with one another without transmission through a hub.

[57] *See* T+1 Report, *supra* note 18, at 8–9.

[58] Sean McEntee, Executive Director, ITP Product Management, DTCC, Remarks at the DTCC ITP Forum—Americas (June 17, 2021) (''DTCC ITP Forum Remarks'') (recording available at *https://www.dtcc.com/events/archives*).

will allocate securities within the block to the accounts of its clients participating in the block, as reflected in Figure 3. These allocation instructions are communicated to the broker-dealer so that the broker-dealer can generate a confirmation of the trade details for each account for the investment adviser to affirm.

***Figure 3.** Processing of a block trades from the perspective of an institutional investor or its investment adviser.*



BILLING CODE 8011–01–C

C. Recent Initiatives and Market Events

Efforts to facilitate a settlement cycle shorter than T+2 began soon after the transition to a T+2 standard settlement cycle had been completed. For example, DTCC announced two initiatives in January 2018 to achieve additional operational and capital efficiencies, dubbed ''Accelerating Time to Settlement'' and ''Settlement Optimization.'' [59] Among other things, the DTCC-owned clearing agencies have been exploring steps to modify their settlement process to be more efficient, such as by introducing new algorithms to position more transactions for settlement during the ''night cycle'' process (which currently begins in the evening of T+1) to reduce the need for activity on the day of settlement. Portions of these two initiatives have been submitted to the Commission and approved as proposed rule changes.[60]

More recently, periods of increased market volatility—first in March 2020 following the outbreak of the COVID–19 pandemic, and again in January 2021 following heightened interest in certain ''meme'' stocks—highlighted the significance of the settlement cycle to the calculation of financial exposures and exposed potential risks to the stability of the U.S. securities market.[61]

[59] DTCC, Modernizing the U.S. Equity Markets Post-Trade Infrastructure (Jan. 2018) (''DTCC Modernizing Paper''), *https://www.dtcc.com/~/media/Files/downloads/Thought-leadership/modernizing-the-u-s-equity-markets-post-trade-infrastructure.pdf.* These initiatives are relevant to the discussion of T+0 building blocks related to netting and batch processing, as discussed in Part IV.B.1 and Part IV.B.2.

[60] *See, e.g.,* Exchange Act Release No. 87022 (Sept. 19, 2019), 84 FR 50541 (Sept. 25, 2019) (order amending NSCC's settlement guide to implement a new algorithm for night cycle transactions); Exchange Act Release No. 87756 (Dec. 16, 2019), 84 FR 70256 (Dec. 20, 2019) (order extending the implementation timeframe for the new algorithm for transactions processed in the night cycle); Exchange Act Release No. 87023 (Sept. 19, 2019), 84 FR 50532 (Sept. 25, 2019) (order amending the CNS Accounting Operation of NSCC's Rules & Procedures with respect to receipt of securities from NSCC's CNS System).

[61] According to DTCC, on March 12, 2020, NSCC processed over 363 million market-side transactions in equity securities, topping by 15% its prior peak set in October 2008 during the financial crisis. On an average day, NSCC processes approximately 106 million market-side transactions. DTCC, Advancing Together: Leading the Industry to Accelerated Settlement, at 4 (Feb. 2021) (''DTCC White Paper''), *https://www.dtcc.com/-/media/Files/PDFs/White%20Paper/DTCC-Accelerated-Settle-WP-2021.pdf.*

Specifically, these two events have expanded a public debate over the length of the settlement cycle, and whether a shorter settlement cycle could have reduced the impact of the market volatility on investors by, among other things, reducing the length of time over which a broker-dealer member of NSCC is required to provide margin deposits with respect to a given transaction, thereby also potentially reducing the size of the deposits required per portfolio to manage the increased volatility.

In February 2021, DTCC published the DTCC White Paper stating that accelerating settlement beyond T+2 may bring significant benefits to market participants but requires careful consideration and a balanced approach so that settlement can be achieved as close to the trade as possible without creating capital inefficiencies or introducing new, unintended consequences—such as inadvertently reducing or eliminating the benefits and cost savings provided by multilateral netting.[62] DTCC suggested that shortening the settlement cycle to T+1 could occur in the second half of 2023, and it estimated that a T+1 settlement cycle could reduce the volatility component of NSCC margin requirements by up to 41%.[63] DTCC also contended that achieving T+1 could be largely supported by using existing systems and available tools and procedures.[64] With respect to a T+0 settlement cycle, DTCC distinguished between netted T+0 settlement and real-time gross settlement,[65] noting that in a netted settlement environment, trades would be netted either during the day or prior to settlement at the end of the day; with real-time gross settlement, trades would be settled instantaneously without netting. Currently, the DTCC clearing agencies can facilitate settlement on either T+1 or T+0 pursuant to their rules and procedures for accelerated settlement.[66] The DTCC White Paper explained that DTCC's participants believe ''the hurdles to T+0 settlement,'' especially real-time gross settlement, are ''too great at this time.'' [67] Furthermore, DTCC noted that real-time gross settlement could require trades to be funded on a trade-for-trade basis, eliminating the liquidity and risk-reduction benefits of existing CCP netting processes.[68] Additionally, DTCC indicated that over the past year it has been working collaboratively with a cross-section of market participants to build support for further shortening of the settlement cycle, and has outlined a plan to increase these efforts to forge a consensus on setting a firm date and approach to achieving a transition to T+1.[69]

Following publication of the DTCC White Paper, the securities industry formed an Industry Steering Committee (''ISC'') and an Industry Working Group (''IWG'') [70] with the intent of developing industry consensus for an accelerated settlement cycle transition, including to understand the impacts, evaluate the potential risks, and develop an implementation approach. To support this effort, the ISC engaged Deloitte to facilitate the IWG's analysis of the benefits and barriers to moving to T+1, and coordinate with the industry on recommending solutions for the transition.[71] In April 2021, DTCC, ICI, and SIFMA issued a joint press release to announce their collaboration ''on efforts to accelerate the U.S. securities settlement cycle from T+2 to T+1.'' [72]

As stated above, on December 1, 2021, DTCC, SIFMA and ICI, together with Deloitte, published the T+1 Report, which outlined the ISC's recommendations for achieving a T+1 standard settlement cycle, and proposed transitioning to T+1 settlement by the second quarter of 2024.[73] These recommendations focused on the following topics: Allocation and confirmation of institutional trades, trade documentation, global settlement and FX markets, corporate actions, prime brokerage services, securities lending, settlement errors and fails, creation and redemption of exchange traded funds (''ETFs''), equity and debt offerings, and regulatory requirements.[74]

In addition to presenting the ISC's recommendations regarding the requirements for moving to T+1, the T+1 Report stated that the IWG also considered the impacts and benefits of moving to T+0 settlement.[75] The ISC and IWG concluded, by consensus, that T+0 is not achievable in the short term given the current state of the settlement ecosystem.[76] The T+1 Report stated that a move towards a shortening of the settlement cycle to T+0 would require an overall modernization of current-day clearance and settlement infrastructure, changes to business models, revisions to industry-wide regulatory frameworks, and the potential implementation of real-time currency movements to facilitate such a change.[77] Additionally, the IWG indicated that ''adoption of such technologies would disproportionately fall on small and medium-sized firms that rely on manual processing or legacy systems and may lack the resources to modernize their infrastructure rapidly.'' [78] The T+1 Report also described several ''key areas'' that the IWG concluded would be significantly impacted by a move to T+0 settlement. These areas included: Re-engineering of securities processing; securities netting; funding requirements for securities transactions; securities lending practices; prime brokerage practices; global settlement; and primary offerings, derivatives markets and corporate actions.[79] The Commission is assessing these challenges, and in Part IV, includes further discussion of them in requesting comment on considerations related to T+0 settlement.

III. Proposals for T+1

The Commission is proposing the following rules to implement a T+1 standard settlement cycle. First, the Commission proposes to amend Rule 15c6–1 to establish a standard settlement cycle of T+1 for most broker-dealer transactions.[80] In so doing, the Commission also proposes to repeal Rule 15c6–1(c), which currently establishes a T+4 standard settlement cycle for certain firm commitment offerings.[81] Second, the Commission proposes three additional rules applicable, respectively, to broker-

[62] *Id.* at 2. The DTCC White Paper notes that centralized multilateral netting reduces the value of payments that need to be exchanged each day by an average of 98%, and netting is particularly important during times of heightened volatility and volume.

[63] *Id.* at 5, 8.

[64] *Id.* at 5.

[65] *See supra* note 12 and accompanying text (making the same distinction); *infra* Part IV (discussing three potential models for T+0 settlement, and soliciting comment on these models).

[66] *See, e.g.,* DTCC, Same-Day Settlement (SDS), *https://www.dtcc.com/sds.*

[67] DTCC White Paper, *supra* note 61, at 7.

[68] *Id.*

[69] *See* Press Release, DTCC, DTCC Proposes Approach to Shortening U.S. Settlement Cycle to T+1 Within 2 Years (Feb. 24, 2021), *https://www.dtcc.com/news/2021/february/24/dtcc-proposes-approach-to-shortening-us-settlement-cycle-to-t1-within-two-years.*

[70] IWG participation consisted of over 800 subject matter advisors representing over 160 firms from buy- and sell-side firms, custodians, vendors, and clearinghouses. T+1 Report, *supra* note 18, at 4.

[71] *Id.*

[72] *See* Press Release, DTCC, SIFMA, ICI and DTCC Leading Effort to Shorten U.S. Securities Settlement Cycle to T+1, Collaborating with the Industry on Next Steps (Apr. 28, 2021), *https://www.dtcc.com/news/2021/april/28/sifma-ici-and-dtcc-leading-effort-to-shorten-us-securities-settlement-cycle-to-t1.*

[73] *See* T+1 Report, *supra* note 18.

[74] *Id.*

[75] *Id.* at 10.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 11.

[80] *See infra* Part III.A.1.

[81] *See infra* Part III.A.3.

dealers, investment advisers, and CMSPs to improve the efficiency of managing the processing of institutional trades under the shortened timeframes that would be available in a T+1 environment. Specifically, the Commission proposes new Rule 15c6–2 to prohibit broker-dealers who have agreed with a customer to engage in an allocation, confirmation or affirmation process from effecting or entering into a contract for the purchase or sale of a security on behalf of that customer unless the broker-dealer has also entered into a written agreement that requires the allocation, confirmation, affirmation to be completed as soon as technologically practicable and no later than the end of the day on trade date in order to complete settlement in the timeframes required under Rule 15c6–1(a). The Commission also proposes to amend the recordkeeping obligations of investment advisers to ensure that they are properly documenting their related allocations and affirmations, as well as retaining the confirmations they receive from their broker-dealers. Finally, the Commission proposes a requirement for CMSPs to establish, implement, maintain, and enforce written policies and procedures designed to facilitate straight-through processing. Each proposal is discussed further below.

In addition, the Commission also discusses the anticipated impact of T+1 on other Commission rules and existing Commission guidance on Regulation SHO, the financial responsibility rules for broker-dealers under the Exchange Act, Rule 10b–10, prospectus delivery, and rules and operations of self-regulatory organizations (''SROs''). Finally, the Commission proposes to require compliance with each of the above rule proposals, if adopted, by March 31, 2024. The Commission is soliciting comment on all aspects of the proposals, and in each section below also solicits comment on specific aspects of the proposed rules and rule amendments, the anticipated impact on the other Commission rules noted above, and the proposed compliance date.

A. Shortening the Length of the Standard Settlement Cycle

Existing Rule 15c6–1(a) under the Exchange Act provides that, unless otherwise expressly agreed by the parties at the time of the transaction, a broker-dealer is prohibited from entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the second business day after the date of the contract.[82] Rule 15c6–1(a) covers contracts for the purchase or sale of all types of securities except for the excluded securities enumerated in paragraph (a)(1) of the rule. The definition of the term ''security'' in Section 3(a)(10) of the Exchange Act covers, among others, equities, corporate bonds, UITs, mutual funds, ETFs, ADRs, security-based swaps, and options.[83] Application of Rule 15c6–1(a) extends to the purchase and sale of securities issued by investment companies (including mutual funds),[84] private-label mortgage-backed securities, and limited partnership interests that are listed on an exchange.[85]

[82] 17 CFR 240.15c6–1(a).

[83] 15 U.S.C. 78c(a)(10). Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010), amended, among other things, the definition of ''security'' under the Exchange Act to encompass security-based swaps. The Commission in July 2011 granted temporary exemptive relief from compliance with certain provisions of the Exchange Act, including Rule 15c6–1, in connection with the revision of the Exchange Act definition of ''security'' to encompass security-based swaps. *See* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 In Connection With the Pending Revision of the Definition of ''Security'' To Encompass Security-Based Swaps, Exchange Act Release No. 64795 (July 1, 2011), 76 FR 39927, 39938–39 (July 7, 2011). This temporary exemptive relief expired on February 5, 2020. *See* Order Granting a Limited Exemption from the Exchange Act Definition of ''Penny Stock'' for Security-Based Swap Transactions between Eligible Contract Participants; Granting a Limited Exemption from the Exchange Act Definition of ''Municipal Securities'' for Security-Based Swaps; and Extending Certain Temporary Exemptions under the Exchange Act in Connection with the Revision of the Definition of ''Security'' to Encompass Security-Based Swaps, Exchange Act Release No. 84991 (Jan. 25, 2019), 84 FR 863 (Jan. 31, 2019) (extending the expiration date for the relevant portion of the temporary exemptive relief to February 5, 2020); Order Extending Temporary Exemptions from Exchange Act Section 8 and Exchange Act Rules 8c–1, 10b–16, 15a–1, 15c2–1 and 15c2–5 in Connection with the Revision of the Definition of ''Security'' to Encompass Security-Based Swaps, Exchange Act Release No. 87943 (Jan. 10, 2020), 85 FR 2763 (Jan. 16, 2020) (allowing the relevant portion of the temporary exemptive relief to expire on February 5, 2020).

[84] The Commission applied Rule 15c6–1 to broker-dealer contracts for the purchase and sale of securities issued by investment companies, including mutual funds, because the Commission recognized that these securities represented a significant and growing percentage of broker-dealer transactions. *See* T+3 Adopting Release, *supra* note 9, at 52900.

[85] With regard to limited partnership interests, the Commission excluded non-listed limited partnerships due to complexities related to processing the trades in these securities and the lack of an active secondary market. In contrast, the Commission included listed limited partnerships primarily to ensure exclusion of these securities would not unnecessarily contribute to the bifurcation of the settlement cycle for listed securities generally. *See id.* at 52899.

Rule 15c6–1(a) allows the parties to the trade to agree that settlement will take place later than two business days after the trade date, provided that such an agreement is express and reached at the time of the transaction.[86] This provision is sometimes referred to as the ''override provision.'' When the Commission first adopted Rule 15c6–1(a), it stated that use of the override provision ''was intended to apply only to unusual transactions, such as seller's option trades that typically settle as many as sixty days after execution as specified by the parties to the trade at execution.''[87] The override provision in 15c6–1(a) continues to be intended to apply only to these unusual transactions.[88]

Rule 15c6–1(b) provides an exclusion for contracts involving the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association.[89] Pursuant to Rule 15c6–1(b), the Commission has granted an exemption from Rule 15c6–1 for securities that do not have facilities for transfer or delivery in the U.S.[90] However, if the parties execute a transaction on a registered securities exchange, the transaction will be subject to both the rules of the exchange and Rule 15c6–1.[91] Under the exemption, an ADR is considered a separate security from the underlying security.[92] Thus, if there are no transfer facilities in the U.S. for a foreign security but there are transfer facilities for an ADR based on such

[86] 17 CFR 240.15c6–1(a).

[87] T+3 Adopting Release, *supra* note 9, at 52902. In the T+2 Proposing Release, the Commission stated its preliminary belief that the use of this provision should continue to be applied in limited cases to ensure that the settlement cycle set by Rule 15c6–1(a) remains a standard settlement cycle. T+2 Proposing Release, *supra* note 30, at 69257 n.153.

[88] To date, the Commission has not identified instances indicating a risk of overuse of this provision.

[89] 17 CFR 240.15c6–1(b). In recognition of the fact that the Commission may not have identified all situations or types of trades where T+2 settlement would be problematic, Rule 15c6–1(b) provides that the Commission may exempt by order additional types of trades from T+2 settlement, either unconditionally or on specified terms and conditions, if the Commission determines that such an exemption is consistent with the public interest and the protection of investors. *Id.*

[90] *See* Exchange Act Release No. 35750 (May 22, 1995), 60 FR 27994, 27995 (May 26, 1995) (granting an exemption from Rule 15c6–1 for certain transactions in foreign securities). The exemption also provides that if less than 10% of the annual trading volume in a security that has U.S. transfer or deliver facilities occurs in the U.S., the transaction in such security will be exempt from the requirements in the rule.

[91] *Id.*

[92] *Id.* at n.7.

foreign security, only the foreign security will be exempt from Rule 15c6–1.[93] The Commission has also granted a separate exemption for contracts for the purchase or sale of any security issued by an insurance company (as defined in Section 2(a)(17) of the Investment Company Act[94]) that is funded by or participates in a ''separate account'' (as defined in Section 2(a)(37) of the Investment Company Act[95]), including a variable annuity contract or a variable life insurance contract, or any other insurance contract registered as a security under the Securities Act of 1933 (''Securities Act'').[96]

Rule 15c6–1(c) establishes a T+4 settlement cycle for firm commitment underwritings for securities that are priced after 4:30 p.m. Eastern Time (''ET'').[97] Specifically, the rule states that the standard settlement cycle set forth in Rule15c6–1(a) does not apply to contracts for the sale of securities that are priced after 4:30 p.m. ET on the date that such securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment offering registered under the Securities Act or sold to an initial purchaser by a broker-dealer participating in such offering. Under the rule, the broker or dealer must effect or enter into a contract for the purchase or sale of those securities that provides for payment of funds and delivery of securities no later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

Rule 15c6–1(d) provides that, for purposes of paragraphs (a) and (c) of the rule, parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to such date for all securities sold pursuant to such offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.[98]

[93] *Id.*

[94] 15 U.S.C. 80a–2(a)(17).

[95] 15 U.S.C. 80a–2(a)(37).

[96] *See* Exchange Act Release No. 35815 (June 6, 1995), 60 FR 30906, 30907 (June 12, 1995) (granting an exemption from Rule 15c6–1 for transactions involving certain insurance contracts). The Commission determined not to rescind or modify the exemptive order when it shortened the settlement cycle from T+3 to T+2. *See* T+2 Adopting Release, *supra* note 10, at 15581.

[97] 17 CFR 240.15c6–1(c).

[98] 17 CFR 240.15c6–1(d).

1. Proposed Amendment to Rule 15c6–1(a)

The Commission proposes to amend Rule 15c6–1(a) to prohibit a broker-dealer from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the first business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.[99] The Commission's proposal to amend Rule 15c6–1(a) would change only the standard settlement date for securities transactions covered by the existing rule, and would not impact the existing exclusions enumerated in the rule. In addition, the Commission's proposal would retain the so-called ''override provision,'' and the Commission continues to intend for the ''override provision'' to apply only to unusual cases to ensure that the settlement cycle set by Rule 15c6–1(a) is in fact the standard settlement cycle.[100]

2. Basis for Shortening the Standard Settlement Cycle to T+1

First, the Commission preliminarily believes that market participants have made substantial progress toward identifying the technological and operational changes that would be necessary to establish a T+1 standard settlement cycle, and significant industry support for such a move has emerged. By contrast, at the time the Commission proposed to shorten the standard settlement cycle to T+2, market participants generally supported moving to T+2 and many believed that moving to T+1 would be substantially more costly and take longer to achieve than moving to T+2.[101] At that time, neither the Commission nor the industry supported moving to a T+1 standard settlement cycle.[102] Since then, Commission staff has continued to study the potential impact of further shortening the settlement cycle, and the ISC has recommended that the securities industry implement a T+1 standard settlement cycle.[103]

The Commission acknowledges that a transition from a T+2 to T+1 standard settlement cycle, and implementation of the necessary operational, technical, and business changes, will likely result in varying burdens, costs and benefits for a wide range of market participants.[104] The Commission has remained mindful and observant of industry initiatives and progress targeted at facilitating an environment where a shortened standard settlement cycle could be achieved in a manner that reduces risk for market participants while also minimizing the likelihood of disruptive burdens and costs. Having taken current industry initiatives and their relative progress into consideration, the Commission preliminarily believes there has been collective progress by market participants sufficient to facilitate a transition to a T+1.

[99] 17 CFR 240.15c6–1(a).

[100] *See supra* note 88.

[101] *See* T+2 Adopting Release, *supra* note 10, at 15598–99.

[102] *See id.* at 15572.

[103] *See supra* notes 73–74 and accompanying text (discussing the recommendations in the T+1 Report).

Furthermore, when the Commission adopted a T+2 standard settlement cycle, it identified a number of incremental improvements to the functioning of the U.S. securities market likely to result relative to a T+3 standard settlement cycle.[105] The Commission preliminarily believes that a T+1 settlement cycle would produce similar incremental improvements to the functioning of the U.S. securities market relative to a T+2 settlement cycle. These benefits, discussed further in Part V.C.1, are summarized briefly here.

First, as a general matter, time to settlement determines a significant portion of a market participant's risk exposure on a given securities transaction. As a result, all else being equal, shortening the time to settlement reduces exposure to credit,[106] market,[107] and liquidity risk.[108] In addition, assuming that trading volume remains constant, shortening the time to settlement also decreases the total number of unsettled trades that exists at any point in time, as well as the total

[104] *See infra* Part V (analyzing the economic effects of shortening the standard settlement cycle to T+1).

[105] *See* T+2 Adopting Release, *supra* note 10, at 15569–75.

[106] Credit risk refers to the potential for the market participant's counterparty to a given transaction to default on the transaction and therefore the market participant will not receive either the cash or securities necessary to settle the transaction.

[107] Market risk refers to the potential for the value of the security that underlies the transaction to change between trade execution and settlement.

[108] Liquidity risk refers to the risk that the market participant will be unable to timely settle a transaction because it does not have access to sufficient cash or securities. The market participant may not have access to sufficient cash or securities for a given transaction if, for example, it has recently been exposed to the default of a counterparty on a separate transaction and did not receive the anticipated proceeds of that transaction.

market value of all unsettled trades.[109] This reduction in the number and total value of unsettled trades should correspond to a reduction in a market participant's overall exposure to risk arising from unsettled transactions.

Second, the above dynamics produce noticeable effects for transactions that are centrally cleared because they reduce the CCP's exposure to credit, market, and liquidity risk arising from its obligations to its participants, promoting the stability of the CCP and thereby reducing the potential for systemic risk to transmit through the financial system. For example, when the CCP faces a participant default, the CCP will liquidate open positions of the defaulting participant and use the defaulting participant's financial resources held by the CCP to cover the CCP's losses and expenses. The CCP may face losses if the market value of the defaulting participant's open positions has moved significantly in the time between trade execution and default.[110] While the CCP works to close out the defaulting participant's open positions, it also needs to continue to meet its end-of-day settlement obligations to non-defaulting participants, and so the CCP is exposed to liquidity risk when a member defaults because it may need to use its own resources to complete end-of-day settlement.[111] In each instance, the amount of risk to which the CCP is exposed is determined in part by the length of the settlement cycle, and shortening the settlement cycle would reduce the CCP's overall exposure to these risks.

Third, reducing these risks to the CCP would reduce the overall size of the financial resources that the CCP requires of its participants,[112] thereby reducing the risks and costs faced by the CCP participants (*i.e.,* broker-dealers) and, by extension, their customers (*i.e.,* investors).[113] CCP participants may choose to pass these reductions down to their customers.

Fourth, the Commission anticipates that the above effects would reduce the potential for systemic risk.[114] When the Commission proposed to shorten the standard settlement cycle from T+3 to T+2 it explained that its ''views are even more apt today given the increasing interconnectivity and interdependencies among markets and market participants.'' [115] In particular, in periods of market stress, liquidity demands imposed by the CCP on its participants, such as in the form of intraday margin calls, can have procyclical effects that reduce overall market liquidity.[116] Reducing the CCP's liquidity exposure by shortening the settlement cycle can help limit this potential for procyclicality,[117] enhancing the ability of the CCP to serve as a source of stability and efficiency in the national clearance and settlement system.[118]

Finally, shortening the standard settlement cycle to T+1 would enable investors to access the proceeds of their securities transactions sooner than they are able to in the current T+2 environment. In particular, in a T+1 environment, sellers would have access to cash proceeds one day sooner and buyers would see purchased securities in their accounts one day earlier relative to a T+2 standard settlement cycle.

In addition, as noted above, the Commission has evaluated the potential for shortening the settlement cycle to impose costs on market participants, which are likely to vary across market participants depending on a number of facts. These costs and considerations are discussed in Part V.C.2. The costs include those costs associated with investments in improved operations and new technologies to manage the compression of time resulting from a shorter settlement cycle. Shortening the settlement cycle may have other effects as well. For example, shortening the standard settlement cycle to T+1 for equity securities would disconnect settlement with foreign exchange (''FX'') transactions, which settle on a T+2 basis. Mismatched settlement timeframes between equities and FX transactions may increase the cost needed to fund and hedge related securities transactions.[119] In addition, the Commission recognizes that a disorderly transition to a shorter settlement cycle could lead to an increase in settlement fails. However, as discussed in Part V.B.4, in analyzing the shortening of the settlement cycle from T+3 to T+2, the Commission found no marked change in the volume of such failures. The Commission preliminarily believes that an orderly transition to a T+1 standard settlement cycle can limit the negative effects of settlement fails. The Commission also believes that facilitating an increase in same-day affirmations helps mitigate the effects of settlement fails, as affirmations on trade date can limit the potential for processing errors on settlement day that cause fails.[120] More generally, the Commission preliminarily believes that the anticipated benefits of a shortened settlement cycle justify the anticipated costs.

3. Proposed Deletion of Rule 15c6–1(c) and Conforming Technical Amendments to Rule 15c6–1

As explained above, Rule 15c6–1(c) establishes a T+4 settlement cycle for firm commitment offerings for securities that are priced after 4:30 p.m. ET, unless otherwise expressly agreed to by the parties at the time of the transaction.

[109] In other words, a T+2 settlement cycle results in two days of unsettled transactions at any given time, whereas a T+1 settlement cycle would result in one day of unsettled transactions at any given time.

[110] For example, if the open position is net long, to close the position the CCP would obtain replacement securities in the market, possibly at a higher price than the original transaction. Conversely, if the open position is net short, to close the position the CCP would sell the defaulting participant's securities in the market, possibly at a lower price than the original transaction.

[111] The costs associated with deploying such resources are ultimately borne by the CCP members, both in the ordinary course of the CCP's daily risk management process and in the event of an extraordinary event where members may be subject to additional liquidity assessments. These costs may be passed on through the CCP members to broker-dealers and investors.

[112] *See* T+2 Proposing Release, *supra* note 30, at 69251 n.77 (discussing mutual fund settlement timeframes and related liquidity risk, which may be exacerbated during times of stress). The Commission preliminarily believes that shortening settlement timeframes for portfolio securities to T+1 will generally assist in reducing liquidity and other risks for funds that must satisfy investor redemption requests that settle pursuant to shorter settlement timeframes (*e.g.,* T+1).

[113] *See id.* at 69251.

[114] As the Commission noted when it adopted Rule 15c6–1, reducing the total volume and value of outstanding obligations in the settlement pipeline at any point in time will better insulate the financial sector from the potential systemic consequences of serious market disruptions. *See* T+3 Adopting Release, *supra* note 9, at 52894.

[115] T+2 Proposing Release, *supra* note 30, at 69258 n.160 (citing Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220, 66254 (Nov. 2, 2012) (''Clearing Agency Standards Adopting Release'') and DTCC, Understanding Interconnectedness Risks—To Build a More Resilient Financial System (Oct. 2015), *http://www.dtcc.com/news/2015/october/12/understanding-interconnectedness-risks-article*).

[116] For a discussion regarding procyclicality, *see* T+2 Proposing Release, *supra* note 30, at 69250–52.

[117] *See* T+3 Adopting Release, *supra* note 9, at 52894.

[118] *See* Standards for Covered Clearing Agencies, Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 16865 (Mar. 26, 2014), *corrected at* 79 FR 29507, 29598 (May 22, 2014) (''CCA Standards Proposing Release''). Clearing members are often members of larger financial networks, and the ability of a covered clearing agency to meet payment obligations to its members can directly affect its members' ability to meet payment obligations outside of the cleared market. Thus, management of liquidity risk may mitigate the risk of contagion between asset markets.

[119] *See infra* Part V.C.2 (noting that market participants will have a choice between bearing an additional day of currency risk or incurring the cost related to hedging away this risk in the forward or futures market).

[120] *See infra* Part III.B (proposing new Rule 15c6–2 to increase same-day affirmations); Part V.C.1 (noting that the proposed rule can facilitate an orderly transition to T+1).

The Commission proposes to delete this provision. Deleting Rule 15c6–1(c) would, in conjunction with the proposed amendment to Rule 15c6–1(a), set a T+1 standard settlement cycle for firm commitment offerings priced after 4:30 p.m. ET. However, the so-called ''override'' provisions in paragraphs (a) and (d) of Rule 15c6–1 would continue to allow contracts currently covered by paragraph (c) to provide for settlement on a timeframe other than T+1 if the parties expressly agree to a different settlement timeframe at the time of the transaction.

In proposing to delete paragraph (c) of Rule 15c6–1, the Commission also proposes conforming amendments to paragraphs (a), (b), and (d) of the rule. Specifically, the Commission is proposing to delete all references to paragraph (c) of Rule 15c6–1 that currently appear in paragraphs (a), (b) and (d) of the rule.

4. Basis for Eliminating T+4 Standard for Certain Firm Commitment Offerings

The Commission believes that expanded application of the ''access equals delivery'' standard for prospectus delivery supports removing paragraph (c) from Rule 15c6–1 because delays in the process that made delivery of the prospectus difficult to achieve under the standard settlement cycle have been mitigated by the ''access equals delivery'' standard. In addition, if paragraph (c) is removed as proposed, paragraph (d) would continue to provide underwriters and the parties to a transaction the ability to agree, in advance of a particular transaction, to a settlement cycle other than the standard set forth in Rule 15c6–1(a) when needed to manage obligations associated with the firm commitment offering.

The Commission adopted paragraphs (c) and (d) of Rule 15c6–1 in 1995, two years after Rule 15c6–1 was originally adopted.[121] At the time, the rule included a limited exemption from the requirements under paragraph (a) of the rule for the sale for cash pursuant to a firm commitment offering registered under the Securities Act.[122] The exemption for firm commitment offerings was added in response to public comments stating that new issue securities could not settle on T+3 because prospectuses could not be printed prior to the trade date (the date on which the securities are priced).[123]

When the Commission proposed to amend Rule 15c6–1 in 1995, it stated that, since the adoption of the rule, members of the brokerage community had suggested the Commission eliminate the exemption and ease the problems associated with prospectus delivery by other means. The primary reasons expressed for requiring T+3 settlement of such offerings were: (i) The secondary market for a new issue may be subject to greater price fluctuations or instability, which in turn may expose underwriters, dealers and investors to disproportionate credit and market risk; and (ii) the bifurcated settlement cycle created for initial sales and resales of new issues would be disruptive to broker-dealer operations and to the clearance and settlement system.[124] In particular, it was explained that if a purchaser of a new issue sells on the first or second day after pricing, the purchaser's broker will not be able to settle with the buyer's broker on a T+3 schedule because the securities would not yet be available for settlement purposes.[125] As a result, all such trades by the purchasers would ''fail'' and result in expense, inefficiencies, and greater settlement risk for all participants. A bifurcated settlement cycle also may require the maintenance of separate computer systems and additional internal procedures.

The vast majority of commenters submitting feedback in response to the 1995 Amendments Proposing Release supported T+4 as the standard settlement cycle for firm commitment offerings price after 4:30 p.m.[126] Several of these commenters reasoned that it is difficult to print prospectuses within a T+3 timeframe when securities are priced late in the day. These commenters also stated that the potential systemic and market risks associated with the proposed T+4 provision should be limited because most secondary market trading in the subject securities would not begin trading until the opening of the market on the next business day, and therefore the primary issuance of securities would be available to settle secondary trading in the security.[127]

The T+1 Report stated that paragraph (c) is rarely used in the current T+2 settlement environment, but the IWG expects a T+1 standard settlement cycle would increase reliance on paragraph (c).[128] The T+1 Report further stated that the IWG recommends retaining paragraph (c) but amending it to establish a standard settlement cycle of T+2 for firm commitment offerings.[129] The T+1 Report cited issues with respect to complex documentation and other operational elements of equity offerings that may delay settlement to T+2 in a T+1 environment.

With respect to debt offerings, the T+1 Report stated that many such offerings frequently rely on the exception provided in Rule 15c6–1(d).[130] In describing the reasons debt offerings ''have historically needed, and will continue to need, this exemption if the standard settlement cycle is moved to T+1,'' the T+1 Report stated that such offerings are ''document-intensive and typically have more documentation than equity offerings.'' [131] According to the T+1 Report, this documentation includes indentures, guarantees, and collateral documentation, all of which are individually negotiated and unique to the transaction.[132] Thus, the T+1 Report states, a substantial portion of debt offerings settle later than T+3.[133]

While the Commission appreciates that documentation relating to firm commitment offerings for equities must be completed prior to settlement of such transactions, the T+1 Report did not explain why or how timely completion of such documentation would not be possible if the exception in paragraph (c) of Rule 15c6–1 were eliminated. In contrast, the T+1 Report states, as discussed above, that firm commitment offerings generally settle in alignment with the standard settlement cycle. As the Commission is not currently aware of any data or facts indicating that the documentation associated with firm commitment offerings cannot be completed by T+1, the Commission preliminarily believes that the need to complete transaction documentation prior to settlement does not justify proposing a separate standard settlement cycle of T+2 for equity offerings. Rather, to the extent that documentation may in some cases require more time to complete than is available under a T+1 standard settlement cycle, the parties to the

[121] *See* Prospectus Delivery; Securities Transaction Settlement Cycle, Exchange Act Release No. 34–35705 (May 11, 1995), 60 FR 26604 (May 17, 1995) (''1995 Amendments Adopting Release'').

[122] The exemption was limited to sales to an underwriter by an issuer and initial sales by the underwriting syndicate and selling group. Any secondary resales of such securities were to settle on a T+3 settlement cycle. T+3 Adopting Release, *supra* note 9, at 52898.

[123] *Id.*

[124] *See* Exchange Act Release No. 34–35396 (Feb. 21, 1995), 60 FR 10724 (Feb. 27, 1995) (''1995 Amendments Proposing Release'').

[125] *Id.*

[126] 1995 Amendments Adopting Release, *supra* note 121, at 26608.

[127] *Id.*

[128] T+1 Report, *supra* note 18, at 33–35.

[129] *Id.* at 33.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

transaction can agree to a longer settlement period pursuant to paragraph (d) when they enter the transaction. In this way, deleting paragraph (c) does not prevent the parties from using paragraph (d) to agree to a longer settlement period; it only removes the presumption that such firm commitment offerings should be subject to a different settlement cycle than the standard settlement cycle set forth in paragraph (a).

In addition, as discussed further in Part III.E.4, 17 CFR 230.172 (''Rule 172'') has implemented an ''access equals delivery'' model that permits, with certain exceptions, final prospectus delivery obligations to be satisfied by the filing of a final prospectus with the Commission, rather than delivery of the prospectus to purchasers. As a result of these changes, broker-dealers generally would not require time to print and deliver prospectuses—a point originally cited by many commenters in support of adopting paragraph (c)—and the Commission preliminarily believes that broker-dealers are able to satisfy their obligations with respect to these firm commitment offerings on a timeline much shorter than the current T+4 standard settlement cycle for these firm commitment offerings.

In addition, establishing T+1 as the standard settlement cycle for these firm commitment offerings, and thereby aligning the settlement cycle with the standard settlement cycle for securities generally, would reduce exposures of underwriters, dealers, and investors to credit and market risk, and better ensure that the primary issuance of securities is available to settle secondary market trading in such securities.[134] The Commission believes that harmonizing the settlement cycle for such firm commitment offerings with secondary market trading, to the greatest extent possible, limits the potential for operational risk.

Therefore, in the Commission's view, deleting paragraph (c) while retaining paragraph (d) provides sufficient flexibility for market participants to manage the potential need for longer than T+1 settlement on certain firm commitment offerings priced after 4:30 p.m. that may include ''complex'' documentation because paragraph (d) would continue to permit the underwriters and the parties to a transaction to agree, in advance of entering the transaction, whether T+1 settlement or some other settlement timeframe is appropriate for the transaction. In addition, the Commission believes that having the underwriters and the parties to the transaction agree in advance of entering the transaction whether to deviate from the standard settlement cycle established in paragraph (a) would promote transparency among the parties, in advance of entering the transaction, as to the length of the time that it takes to complete documentation with respect to the transaction. The Commission requests comment on these views. To the extent that commenters agree with the T+1 Report, the Commission requests that such commenters provide data or other detailed information explaining why a T+1 settlement cycle is an inappropriate standard for all firm commitment offerings priced after 4:30 p.m., such as an explanation or description for what specific documentation cannot be completed consistent with a T+1 settlement cycle.

5. Request for Comment

The Commission is requesting comment on all aspects of the proposed amendments to Rule 15c6–1 to shorten the current T+2 and T+4 standard settlement cycles to T+1. The Commission also solicits comment on the particular questions set forth below, and encourages commenters to submit any relevant data or analysis in connection with their answers.

1. Should the Commission amend Rule 15c6–1 to shorten the standard settlement cycle to T+1 as proposed? Why or why not?

2. Are efforts to shorten the standard settlement cycle to T+1 a logical step on the path to T+0 settlement, or would shortening to T+1 require investments or processes that would be outdated or unnecessary in a T+0 environment?[135] Please explain why or why not.

3. Is the current scope of securities covered by Rule 15c6–1, including the exclusions provided in the text of Rule 15c6–1(a), still appropriate in light of the Commission's proposal to shorten the standard settlement cycle to T+1? Are there any asset classes, securities as defined in Section 3(a)(10) of the Exchange Act, or types of securities transactions for which the proposed amendment to Rule 15c6–1(a) would present compliance problems for broker-dealers? What would be the quantitative and qualitative impacts of maintaining those exclusions?

4. The Commission requests that commenters provide information regarding securities transactions that, in today's T+2 settlement environment, generally settle later than T+2. To what extent does this occur, and what are the circumstances that motivate market participants to settle later than T+2? If Rule 15c6–1(a) is amended to shorten the standard settlement cycle from T+2 to T+1, would market participants continue to settle such securities transactions on a longer settlement cycle? Would market participants who frequently settle certain securities transactions later than T+2 settle such transactions later than T+1 if the Commission adopts the proposed amendment to Rule 15c6–1(a)? Conversely, under what circumstances are securities transactions settled on an expedited basis (*i.e.,* on timeframes less than T+2), and how often how common is such settlement? What are the circumstances that motivate earlier settlements? If Rule 15c6–1(a) is amended to shorten the standard settlement cycle from T+2 to T+1, how will the proposed amendment affect these expedited settlement decisions?

5. To what extent do market participants currently rely on the override provision in Rule 15c6–1(a)? Would market participants expect use of the provision to increase or decrease in a T+1 environment? Why or why not?

6. As noted above, the Commission previously issued an order that exempted security-based swaps from the requirements under Rule 15c6–1, and

[134] As noted above, prior to the Commission's 1995 amendments to Rule 15c6–1 members of the broker-dealer community expressed the view that (i) the secondary market for a new issue may be subject to greater price fluctuations or instability, which in turn may expose underwriters, dealers and investors to disproportionate credit and market risk; and (ii) a bifurcated settlement cycle created for initial sales and resales of new issues would be disruptive to broker-dealer operations and to the clearance and settlement system. *See supra* notes 124, 125, and accompanying text. While these arguments were made by market participants when the standard settlement cycle in the U.S. was still T+3, the Commission preliminarily believes that they remain relevant to the Commission's proposed amendment to Rule 15c6–1(a) and proposed deletion of Rule 15c6–1(c). In particular, if the Commission were to adopt the proposed amendment to Rule 15c6–1(a) without deleting Rule 15c6–1(c), a broker-dealer settling on behalf of a customer who sells shares of a new issue on the first day after pricing might, in some cases, not be able to settle with the purchaser's broker-dealer because the securities may not yet be available for settlement. Specifically, if the new issue settled on T+2 and the secondary market transactions executed on the first day of trading settled on T+1, the primary issuance would presumably not be available for timely settlement of the secondary market transactions. Conversely, if the Commission adopts both the proposed amendment to Rule 15c6–1(a) and the proposed deletion of Rule 15c6–1(c), the settlement cycle would not be bi-furcated and the basis for the above-described concerns raised previously by the broker-dealer community related to bi-furcation of the settlement cycle would not be applicable.

[135] *See supra* note 12 and accompanying text (explaining that T+0 in this release is intended to refer to netted settlement by the end of trade date); *see also infra* Part IV (discussing the same).

subsequently extended that exemptive relief on several occasions, but the exemptive relief that previously covered compliance with Rule 15c6–1 expired in 2020.[136] Should the Commission issue a new order providing exemptive relief from compliance with Rule 15c6–1 for transactions in security-based swaps? If so, why or why not?

7. Should the Commission amend any other provisions of Rule 15c6–1 (other than the proposed amendments to the rule) for the purposes of shortening the standard settlement cycle to T+1? If so, which provisions and why?

8. Are the conditions set forth in the Commission's exemptive order for securities traded outside the U.S. still appropriate?[137] If not, why not? If the exemption should be modified, how should it be modified and why?

9. Are the conditions set forth in the Commission's exemptive order for insurance contracts still appropriate?[138] If not, why not? If the exemption should be modified, how should it be modified and why?

10. Should the Commission provide exemptive relief under Rule 15c6–1(b) for any other securities or types of transactions?

11. Would shortening the standard settlement cycle to T+1 as proposed make it difficult for broker-dealers to comply with the requirements of Rule 15c6–1? Please provide examples.

12. How would retail investors be impacted by new processes that broker-dealers may implement in support of a T+1 standard settlement cycle? For example, do commenters believe that broker-dealers would require changes to the way that retail investors fund their accounts in a T+1 environment? If so, how? Would shortening the standard settlement cycle to T+1 result in retail investors encountering ongoing costs due to a delay in their ability to make investments? Would shortening the standard settlement cycle to T+1 result in any benefits to retail investors?

13. How would institutional investors be impacted by new processes that broker-dealers may implement in support of a T+1 standard settlement cycle? For example, do market participants anticipate an increase in prefunding requirements for institutional investors in a T+1 environment?

14. What impact, if any, would the proposed amendment to Rule 15c6–1(a) have on market participants who engage in cross-border transactions? To what extent would shortening the standard settlement cycle in the U.S. to T+1 result in increased or decreased operational costs to market participants? To what extent would shortening the standard settlement cycle for securities transactions in the U.S. increase or decrease risks associated with cross-border transactions or related transactions, such as financing transactions?

15. What impact, if any, would the proposed amendment to Rule 15c6–1(a) have on market participants who engage in trading activity across various financial product classes, each potentially involving a different settlement cycle? For example, what would be the impact on market participants conducting transactions in U.S. equities and U.S. commercial paper on the same day? Alternatively, are there benefits to alignment of the settlement timeframes across most U.S. security types to one day? For example, options and government securities currently settle on T+1 while equities, corporate bonds, and municipal debt settle on T+2.

16. What impact, if any, would the proposal have on trading involving derivatives and exchange-traded products (''ETPs'')?[139] Would shortening the settlement cycle for ETPs affect the costs of creating or redeeming shares in ETPs that hold portfolio securities that are on a different settlement cycle, such as net capital charges related to collateral requirements?[140] If so, would such a change in costs affect the efficiency or effectiveness of the arbitrage between an ETP's secondary market price and the value of its underlying assets? Would such a change lead to other downstream effects, such as an increase in the use of cash or custom baskets?[141] Similarly, would the proposed amendments affect transactions in derivatives instruments if a derivative were to settle on a different timeframe than its underlying reference assets?

17. What impact, if any, would shortening the standard settlement cycle to T+1 have on the levels of liquidity risk that may currently exist as a result of mismatches between the settlement cycles for different markets? For example, would shortening the standard settlement cycle to T+1 eliminate or reduce any liquidity risk that mutual funds may face as a result of the mismatch between the current T+1 settlement cycle for transactions in open-end mutual fund shares that are settled through NSCC and the T+2 settlement cycle that is applicable to many portfolio securities held by mutual funds?

18. The Commission solicits comment on the status and readiness of the technology and processes currently used by market participants to support a T+1 settlement cycle.

19. What impact would the Commission's proposed deletion of paragraph (c) of Rule 15c6–1 have on underwriters, broker-dealers, and other market participants?

20. Have the technological and operational capabilities of broker-dealers and their service providers improved sufficiently to allow prospectuses to be printed and delivered on time if the standard settlement cycle for firm commitment offerings priced after 4:30 p.m. is shortened to T+1? Please describe such improvements and why they would or would not be sufficient to support shortening the standard settlement cycle for such transactions.

21. Should the Commission shorten the standard settlement cycle for firm commitment offerings priced after 4:30 p.m. to a time frame other than T+1 (*e.g.,* T+2, or T+3)? If so, why?

[136] *See supra* note 83.

[137] *See supra* note 90 and accompanying text.

[138] *See supra* note 96 and accompanying text.

[139] ETPs constitute a diverse class of financial products that seek to provide investors with exposure to financial instruments, financial benchmarks, or investment strategies across a wide range of asset classes. ETP trading occurs on national securities exchanges and other secondary markets that are regulated by the Commission under the Exchange Act, making ETPs widely available to market participants, from individual investors to institutional investors, including hedge funds and pension funds. The largest category of ETPs are ETFs, which are open-end fund vehicles or UITs that are registered investment companies under the Investment Company Act. *See* Request for Comment on Exchange-Traded Products, Exchange Act Release No. 75165 (June 12, 2015), 80 FR 34729 (June 17, 2015).

[140] For example, the way a market participant executes a creation or redemption of an ETF share resembles a stock trade in the secondary market. A market participant typically referred to as an ''Authorized Participant'' or ''AP'' submits an order to create or redeem (''CR'') ETF shares much like an investor submits an order to his broker to buy or sell a stock. Also, similar to a stock trade, the CR order settles on a T+2 settlement cycle through NSCC. *See* ICI, 20 ICI Research Perspective, no. 5, Sept. 2014, at 14, *https://www.ici.org/pdf/per20-05.pdf; see also* DTCC, Exchange Traded Fund (ETF) Processing, *http://www.dtcc.com/clearing-services/equities-trade-capture/etf;* DTCC, ETF and CNS Processing Facts, *https://dtcclearning.com/content/220-equities-clearing/exchange-traded-fund-etf/about-etf/3613-etf-cns-processing-facts.html.*

[141] Rule 6c–11 under the Investment Company Act permits ETFs to use ''custom baskets'' if their basket policies and procedures: (i) Set forth detailed parameters for the construction and acceptance of custom baskets that are in the best interest of the ETF and its shareholders, including the process for any revisions to, or deviations from, those parameters; and (ii) specify the titles or roles of the employees of the ETF's investment adviser who are required to review each custom basket for compliance with those parameters. *See infra* note 257 and accompanying text (further discussing the creation unit purchase and redemption process for ETFs).

22. Would any additional technological and operational changes, if any, be necessary for broker-dealers to print and deliver prospectuses on time for firm commitment offerings priced after 4:30 p.m. if a T+1 standard settlement cycle is adopted for such transactions? What costs would be associated with such improvements?

23. Would the Commission's proposed deletion of paragraph (c) of Rule 15c6–1 decrease exposures of underwriters, dealers and investors to market and credit risks related to the bifurcated settlement periods for new issues and secondary market transactions? Please explain why or why not.

24. With respect to corporate actions, in most cases the ex-date will be the record date (''RD''), meaning that RD–1 will be the last day that a purchaser will gain the dividend or entitlement.[142] Given the shorter timeframes, the Commission requests comments on this dynamic and statements in the T+1 Report urging a concerted effort among exchanges, other authorities, and issuers to standardize some currently fragmented procedures to set up and announce corporate actions.[143]

25. Regarding corporate actions that concern voluntary reorganizations, the Commission solicits comments on the impact of a T+1 settlement cycle on DTC's ''cover/protect'' process for certain tenders, exchanges, or rights offerings.[144] This procedure enables DTC participants to allow their investors to make or change their final elections until the end of an offer's expiration date; where an offer allows, participants provide DTC with a notice of guaranteed delivery, allowing later delivery of the shares or rights. How would this process affect operations under a T+1 settlement cycle? Would any changes to this process be needed?

26. The Commission generally requests comment on the deadlines and timeframes set forth in the T+1 Report. For example, the Commission requests comment on their impact on DTC's IVORS function, used for retiring a UIT by withdrawing assets and transferring them to a new UIT.[145]

27. If the Commission adopts the proposed deletion of paragraph (c) of Rule 15c6–1 and the proposed conforming technical amendments to paragraphs (a), (b) and (d) of the rule, should the Commission adopt any additional amendments to Rule 15c6–1 in connection with such changes?

B. New Requirement for ''Same-Day Affirmation''

As discussed in Part II.B.1, integral to completing the institutional trade process is achieving an affirmed confirmation, which can require a series of communications between a broker-dealer and its institutional customer. Since 2000, market participants have identified accelerating this process, which requires agreement among the parties regarding the trade details that facilitate trade allocation when needed, as well as trade confirmation and affirmation, as one of the core building blocks to improve the speed, safety, and efficiency of the trade settlement process, and ultimately to achieve shorter settlement cycles.[146] In particular, in the SIA Business Case Report, the securities industry noted the need to prioritize ensuring that a higher number and proportion of trades were confirmed and affirmed on trade date.[147] These improvements were considered essential to compressing the settlement cycle and facilitating an environment less prone to operational risk.[148] This objective, where broker-dealers and their institutional customers allocate, confirm, and affirm the trade details necessary to achieve settlement by the end of trade date has sometimes been referred to as ''same-day affirmation.''

In its 2004 concept release seeking comment on methods to improve the safety and operational efficiency of the National C&S System to achieve straight-through processing,[149] the Commission explored whether to adopt its own rule or whether the SROs should amend their existing rules to require the completion of the confirmation and affirmation process on trade date.[150] Many market participants supported a Commission rule to mandate it, but believed that such requirements should be implemented in phases to allow for the development of certain processing improvements.[151] Recommendations for such improvements included: (i) Achieving 100% of trades as matched or affirmed as soon as possible after execution on trade date; (ii) achieving asynchronous (non-sequential) and electronic communication between all trade parties, including notices of execution, allocations, match status, confirmation status, and settlement instructions; (iii) adoption of an industry standard electronic format for message communication; and (iv) adoption of standards that allow manual processing on an exception-only basis.[152]

Since 2004, the industry has made significant progress in developing new centralized systems and processes designed to automate and streamline the institutional trade processing environment, both from an operational and technological perspective.[153] Market participants also rely on a variety of ''local'' matching tools that allow them to compare trade information received from another party against their own trade information. Further, industry coordination has facilitated improved communication between the parties to a trade using standardized messaging protocols, such as FIX, and the SWIFT network. When the Commission proposed to shorten the settlement cycle to T+2, the Commission observed that the market has improved these confirmation, affirmation, and matching processes through the use of CMSPs.[154]

[142] *See, e.g.,* ISITC Virtual Winter Forum, DTCC presentation to Corporate Actions Working Group (Dec. 13, 2021).

[143] T+1 Report, *supra* note 18, at 20.

[144] *Id.* at 19–20; *see also* ISITC Virtual Winter Forum, DTCC presentation to Corporate Actions Working Group (Dec. 13, 2021).

[145] *See* DTC, IVORS Service Guide, *https://www.dtcc.com/~/media/Files/Downloads/Settlement-Asset-Services/EDL/IVORS.pdf.*

[146] *See* SIA Business Case Report, *supra* note 21; BCG Study, *supra* note 22; *see also* T+2 Proposing Release, *supra* note 30, at 69252, 69254 (describing in detail the SIA Business Case Report and the BCG Study). The building blocks are described generally as the core initiatives that need to be implemented prior to shortening the settlement cycle. *See* SIA Business Case Report, *supra* note 21, at 18.

[147] *See, e.g.,* Press Release, SIA, SIA Board Endorses Program to Modernize Clearing, Settlement Process for Securities (July 18, 2002) (statement from the SIA Board of Directors endorsing straight-through processing); letter from Jeffrey C. Bernstein, Chairman, SIA STP Steering Committee, Securities Industry Association (June 16, 2004) (''SIA Letter''). The comment letter is available at *https://www.sec.gov/rules/concept/s71304.shtml.*

[148] T+2 Proposing Release, *supra* note 30, at 69252.

[149] Exchange Act Release No. 49405 (Mar. 11, 2004), 69 FR 12922 (Mar. 18, 2004) (''Concept Release'').

[150] *Id.*

[151] *See* SIA Letter, *supra* note 147 (commenting on the Concept Release); letter from Margaret R. Blake, Counsel to the Association, Dan W. Schneider, Counsel to the Association, The Association of Global Custodians (June 28, 2004) (commenting on the Concept Release). Copies of the comment letters are available at *https://www.sec.gov/rules/concept/s71304.shtml.*

[152] *See supra* note 151.

[153] For example, DTCC ITP Matching has introduced centralized matching with its CTM platform that continues to automate the trade confirmation process and includes connectivity via FIX and the SWIFT network to custodian banks for the purposes of settlement notification. *See* DTCC, Why Is DTCC Migrating US Trade Flows to CTM and Terminating OASYS?, *https://dtcclearning.com/content/1439-cat-institutional-trade-processing/cat-ctm/us-trade-flows/us-trades-on-ctm-faqs/us-trades-on-ctm-general-faqs/7353-why-is-dtcc-migrating-us-trade-flows-to-ctm-and-terminating-oasys.html.*

[154] T+2 Proposing Release, *supra* note 30, at 69258.

A 2010 white paper issued by Omgeo (now DTCC ITP) also described same-day affirmation as ''a prerequisite'' of shortening the settlement cycle because of its impact on the rate of settlement fails and on operational risk.[155] According to data published in 2011 regarding affirmation rates achieved through the use of one CMSP, on average, 45% of trades were affirmed on trade date, 90% were affirmed by the end of T+1, and 92% were affirmed by noon on T+2.[156] Existing processes for matching institutional trades rely on a number of manual elements, and currently only about 68% of trades achieve affirmation by 12:00 midnight at the end of trade date.[157] While these rates have improved over time, the improvements have been incremental and, in the Commission's view, insufficient. Failing to affirm by the end of trade date increases the likelihood that errors or exceptions will not be resolved in time for settlement. The sooner the parties have affirmed the trade information for their transaction, the lower the likelihood of a settlement fail because the parties will have more time to identify and resolve any potential errors. The T+1 Report highlights the need for achieving affirmation on trade date and encourages that on trade date allocations be completed by 7:00 p.m. ET and affirmations by 9:00 p.m. ET to facilitate shortening of the standard settlement cycle to T+1.[158] As discussed below, the Commission proposes Rule 15c6–2 to require completion of institutional trade allocations, confirmations, and affirmations by the end of trade date.

1. Proposed Rule 15c6–2 Under the Exchange Act

The Commission proposes Rule 15c6–2 to require that, where parties have agreed to engage in an allocation, confirmation, or affirmation process, a broker or dealer would be prohibited from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) on behalf of a customer unless such broker or dealer has entered into a written agreement with the customer that requires the allocation, confirmation, affirmation, or any combination thereof, be completed as soon as technologically practicable and no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with Rule 15c6–1(a). As explained in further detail below, the Commission believes that implementing a T+1 standard settlement cycle, as well as any potential further shortening beyond T+1, would require a significant improvement in the current rates of same-day affirmations to ensure timely settlement in a T+1 environment. In this way, the Commission also believes that proposed Rule 15c6–2 should facilitate timely settlement as a general matter, regardless of shortening the settlement cycle, because it will accelerate the completion of affirmations on trade date. Because broker-dealers and their institutional customers will review and reconcile trade data earlier in the settlement process, the Commission believes that same-day affirmation can improve the accuracy and efficiency of institutional trade processing. In particular, conducting these activities earlier in the process, and as soon as technologically practicable, will allow more time to resolve errors, an important consideration as shorter settlement cycles compress the available time to resolve errors.

Proposed Rule 15c6–2 applies requirements to a broker-dealer's contractual arrangements with its institutional customers because the Commission preliminarily believes that broker-dealers are best positioned to ensure (through their contractual arrangements) that their customers, including those acting on behalf of their customers, will perform the required allocation, confirmation, and affirmation functions on the appropriate timeframe and as soon as technologically practicable. Because broker-dealers are the party to a transaction most likely to have access to a clearing agency, the broker-dealer is also the party best positioned to ensure the timely settlement of institutional trades, and as such, should be able to ensure via its customer agreements that institutional customers or their agents also comport their operations to facilitate same-day affirmation.[159] In addition, requiring broker-dealers to enter into written agreements that require the allocation, confirmation, and affirmation processes be completed as soon as technologically practicable and no later than the end of trade date may help increase the use of standardized terms and trade details across market participants, which may enable the parties to reduce their reliance on manual processes in favor of more automated methods.

As proposed, Rule 15c6–2 does not define the terms ''allocation,'' ''confirmation,'' or ''affirmation.'' As discussed in Part II.B.3.c), trade allocation refers to the process by which an institutional investor (often an investment adviser) allocates a large trade among various client accounts or determines how to apportion securities trades ordered contemporaneously on behalf of multiple funds or non-fund clients.[160] The terms ''confirmation'' and ''affirmation'' refer to the transmission of messages among broker-dealers, institutional investors, and custodian banks to confirm the terms of a trade executed for an institutional investor, a process necessary to ensure the accuracy of the trade being settled. Broker-dealers transmit trade confirmations to their customers to verify trade information, and customers provide an affirmation in response to affirm the confirmation so that the transaction can be prepared for settlement. The Commission believes that these terms are widely used and generally understood by market participants who engage in institutional trade processing.

Proposed Rule 15c6–2 uses the term ''confirmation'' to refer to the operational message that includes trade details provided by the broker-dealer to the customer to verify trade information so that a trade can be prepared for settlement on the timeline established in Rule 15c6–1(a).[161] In contrast,

[155] Omgeo, Mitigating Operational Risk and Increasing Settlement Efficiency through Same Day Affirmation (SDA), at 2, 7 (Oct. 2010) (''Omgeo Study'').

[156] DTCC, Proposal to Launch a New Cost-Benefit Analysis on Shortening the Settlement Cycle, at 7 (Dec. 2011), *https://www.dtcc.com/en/news/2011/december/01/proposal-to-launch-a-new-cost-benefit-analysis-on-shortening-the-settlement-cycle.aspx.*

[157] DTCC ITP Forum Remarks, *supra* note 58.

[158] *See* T+1 Report, *supra* note 18, at 13.

[159] In an effort to also encourage investment advisers to ensure that their own operations and procedures for institutional trade processing can accommodate T+1 or shorter settlement timeframes, in Part III.C the Commission proposes an amendment to an existing recordkeeping rule for registered investment advisers.

[160] For example, DTCC ITP's OASYS platform is a trade allocation and acceptance service that communicates trade and allocation details between investment managers and broker-dealers. DTCC ITP is in the process of decommissioning OASYS and replacing it with CTM, an enriched automated system that offers central matching workflow (including allocation) settlement notification and ALERT services. ALERT provides a database for the maintenance and communication of account and SSI information so that investment managers, broker-dealers, custodian banks and prime brokers can share account information electronically. *See* DTCC, ALERT, *https://www.dtcc.com/institutional-trade-processing/itp/alert.*

[161] Confirmations will include the following trade information: transaction type, security (including an identifier and description), account ID and title, trade date, settlement date, quantity, price, commission (if any), taxes and fees (if any), accrued interest (if appropriate) and the net amount of money to be paid or received at settlement. A

Continued

confirmations required by Exchange Act Rule 10b–10 concern a series of disclosures that broker-dealers are required to provide in writing to customers at or before completion of a transaction.[162] While some matching or electronic trade confirmation services may use the operational confirmation process described in proposed Rule 15c6–2 to produce a confirmation for purposes of compliance with Rule 10b–10, others may not. Accordingly, the term ''confirmation'' as used in proposed Rule 15c6–2 should be understood to refer to the institutional trade processing message or verification and not the disclosure required under Rule 10b–10. Below the Commission solicits comment as to whether these terms are sufficiently understood to facilitate compliance with the proposed rule.

Proposed Rule 15c6–2 would also require broker-dealers to enter into a written agreement with a ''customer'' that has agreed to engage in the allocation, confirmation, or affirmation process. For purposes of the rule, the term ''customer'' includes any person or agent of such person who opens a brokerage account at a broker-dealer to effect an institutional trade or purchases or sells a security for which the broker-dealer receives or will receive compensation. In the institutional trade processing environment, the Commission understands that at times, a broker-dealer may accept instructions or trades from entities acting on behalf of the institutional investor. The term, as used in proposed Rule 15c6–2, is intended to cover both the institutional investor and any and all agents acting on its behalf. As stated below, the Commission is seeking further comment on whether the obligations imposed by proposed Rule 15c6–2 should explicitly state that contracts of such agents acting on behalf of the broker-dealer's customer are subject to the proposed rule or whether the proposed rule text as written is sufficiently clear.

Finally, the written agreement executed pursuant to proposed Rule 15c6–1 requires that the allocation, confirmation, and affirmation processes, or any combination thereof, related to these trades be completed as soon as technologically practicable and no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with Rule 15c6–1(a).[163] The Commission is proposing ''end of the day on trade date'' rather than requiring a specific time earlier than end of day to allow firms to maximize their internal processes to meet the appropriate cutoff times and other deadlines, as soon as technologically practicable. The Commission expects that different sectors of the market, different types of asset classes or market participants, and different operational processes (*e.g.,* cross-border transactions) may have varying processing deadlines, some of which may need to be earlier than end of the day to facilitate trade processing. For example, as noted above, the T+1 Report contemplates moving the ''ITP Affirmation Cutoff'' from 11:30 a.m. on the day after trade date to 9:00 p.m. on trade date to facilitate a T+1 settlement cycle.[164] Accordingly, the parties would be able under the rule to require earlier timeframes when appropriate. Moreover, the SROs could consider whether and how to use earlier than end of day deadlines, such as those recommended by the T+1 Report.

2. Basis for Requiring Affirmation No Later Than the End of Trade Date

As discussed in Part II.B, aspects of post-trade processing for institutional transactions remain inefficient and costly for several reasons. Although same-day affirmation is considered a best practice for institutional trade processing, adoption is not universal across market participants or even across all trades entered by a given participant.[165] Market participants continue to use hundreds of ''local'' matching platforms,[166] and rely on inconsistent SSI data independently maintained by broker-dealers, investment managers, custodians, sub-custodians, and agents on separate databases.[167] As discussed in Part II.B, processing institutional trades requires managing the back and forth involved with transmitting and reconciling trade information among the parties, functionally matching and re-matching with the counterparties to the trade, as well as custodians and agents, to facilitate settlement. It also requires market participants to engage in allocation processes, such as allocation-level cancellations and corrections, some of which are still processed manually.[168] This collection of redundant, often manual steps and the use of uncoordinated (*i.e.,* not standardized) databases can lead to delays, exceptions processing, settlement fails, wasted resources, and economic losses. While the proposed rule does not require any changes to manual processes or existing uses of databases and exceptions processing, the Commission preliminarily believes that market participants may pursue improvements to these existing processes to manage their obligations under Rule 15c6–2, if adopted.

Although proposed Rule 15c6–2 does not require settlement of the transaction on trade date, the Commission preliminarily believes the proposed rule helps ensure that institutional trades will timely settle on T+1 because, by promoting the completion of these processes as soon as technologically practicable and no later than the end of trade date, it reduces the likelihood of exceptions or other errors with respect to trade information that can prevent a transaction from settling. In the Commission's view, because the rule requires that allocation, confirmation, and affirmation be completed as soon as technologically practicable and no later than the end of trade date, it can also facilitate shortening the settlement cycle, both with respect to T+1 and potentially for shortening beyond T+1 in the future. By elevating an industry best practice to a Commission

confirmation will also include the broker name and whether the broker-dealer was acting as principal or agent on the trade.

[162] 17 CFR 240.10b–10. For more information on confirmations required under Rule 10b–10, *see* Part III.E.3.

[163] For purposes of this rule, ''end of the day'' has the same meaning as it is generally understood: no later than 11:59:59 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect on trade date.

[164] *See* T+1 Report, *supra* note 18, at 39.

[165] While the concept of completing these functions on trade date has often been referred to a ''same-day'' affirmation, the Commission is proposing instead to use the term ''trade date'' in the rule to be clear that the allocation, confirmation, and affirmation process should be completed on the trade date.

[166] Local matching platforms include, for example, the trade reconciliation and inventory management tools that market participants use to reconcile trade information. *See* DTCC, Embracing Post-Trade Automation: Seven Ways the Sell-Side Will Benefit from No-Touch Future (Nov. 2020) (''DTCC Embracing Post-Trade Automation''), *https://www.dtcc.com/itp-hub/dist/downloads/broker_supplement_11.11.20z.pdf.* Examples of such service providers include Bloomberg, Corfinancial, Lightspeed, and SS&C Technologies.

[167] For more information about the use and impact of ''local'' matching platforms, *see supra* note 166. A 2020 DTCC survey of global broker-dealers found that certain institutional post-trade processing costs could be reduced by 20–25% through leveraging post-trade automation, which would in turn eliminate redundancies and manual processing and mitigate operational risks. *See* DTCC, DTCC Identifies Seven Areas of Broker Cost Savings as a Result of Greater Post-Trade Automation (Nov. 18, 2020), *https://www.dtcc.com/news/2020/november/18/dtcc-identifies-seven-areas-of-broker-cost-savings-as-a-result-of-greater-post-trade-automation; see also* DTCC Embracing Post-Trade Automation, *supra* note 166.

[168] *See* DTCC, Re-Imagining Post-Trade: No-Touch Processing Within Reach, at 4 (Sept. 2019), *https://www.dtcc.com/-/media/Files/Downloads/Institutional-Trade-Processing/ITP-Story/DTCC-Re-Imagining-Post-Trade.pdf.*

requirement, the Commission believes that proposed Rule 15c6–2 can significantly improve the current 68% rate of affirmations on trade date by standardizing the obligations of broker-dealers and their institutional customers with respect to the timing of achieving affirmations. This, in turn, could facilitate increases in operational efficiency necessary to support an orderly transition to shorter settlement cycles. The Commission also anticipates that SROs will consider whether to propose rule changes to incorporate the requirements in new Rule 15c6–2 if adopted,[169] and proposed Rule 15c6–2 would likely encourage further development of automated and standardized practices among market participants to facilitate settlement of institutional trades.

3. Request for Comment

The Commission solicits comment on the particular questions set forth below, and encourages commenters to submit any relevant data or analysis in connection with their answers.

28. Would proposed Rule 15c6–2 accomplish the stated objectives? Would the proposed rule encourage further standardization and automation in the processing of institutional trades? What effect will the proposed rule have on improving efficiencies and reducing errors and fails? Please provide a basis or explanation for your position.

29. Proposed Rule 15c6–2 uses such terms as ''allocation,'' ''confirmation,'' and ''affirmation.'' As discussed above, the Commission believes that these are well understood concepts. Should these terms be defined for purposes of the proposed rule? If so, please explain which terms need further definition and why? Please include the recommended elements of such definitions.

30. Similarly, does the term ''end of the day on trade date'' need to be defined? If so, please provide information as to why and include recommended elements of such a definition.

31. Proposed Rule 15c6–2 uses the term ''customer.'' Given that often agents of the customer are providing allocation, confirmation or affirmation instructions or communications to the broker-dealer on behalf of the broker-dealer's customer, does the rule as written address this scenario? Does the use of the term ''customer'' sufficiently incorporate any and all agents of the customer? Is the Commission's understanding of these terms consistent with the industry's use of these terms? Why or why not? Should the term ''customer'' be defined for purposes of Rule 15c6–2? If so, please include the recommended elements of such a definition.

32. What effect would proposed Rule 15c6–2 have on the relationship between a broker-dealer and its customer?

33. Do the perceived benefits of proposed Rule 15c6–2 or the benefits of trade date confirmation and affirmation accrue to all participants—brokers-dealers (including prime brokers), institutional customers, custodians, or matching utilities? If not, why? Do they accrue differently based on size of the entity? Please explain.

34. Does proposed Rule 15c6–2 introduce any new risks? If so, please describe such risks and whether they can be quantified. Can these risks be mitigated? If so, how?

35. If proposed Rule 15c6–2 is adopted by the Commission, what should be the necessary time frame for implementing such a rule? What factors should the Commission consider in determining the implementation date?

36. Would proposed Rule 15c6–2 affect cross-border trading or cross-border trade processing? If so, how would it do so?

37. As proposed, Rule 15c6–2 excludes exempted securities, government securities, municipal securities, commercial paper, bankers' acceptances, and commercial bills. For those asset classes that do not already settle on T+1, should the proposed rule apply to any or all of these excluded securities? Please discuss the reasons why any or all of these securities should or should not be excluded from Rule 15c6–2.

38. What if anything should the Commission do to further facilitate the use of standardized industry protocols and standardization of reference data by broker-dealers and institutional customers, including investment advisers and custodians? What if anything should the Commission do to further facilitate efficiency in processing institutional trades and reducing errors and fails?

39. Would the adoption of further Commission rules be necessary to require or further facilitate the objective of ensuring that institutional trades are operationally capable of settling on a T+1 or shorter timeframe?

40. The T+1 Report indicates that market participants may cancel and rebill an affirmed trade because of a monetary change to the trade and states that these instances occur frequently in a T+2 settlement cycle.[170] Why are trades affirmed when monetary amounts may not agree? Should it be permissible to cancel an affirmed trade? Why or why not?

41. Are investment advisers matching their records about a trade against the received confirmation prior to affirming? If not, why not? If so, what criteria are used to determine that a 'match' has occurred? Which fields must match? Should financial values, such as unit price, total commission, accrued interest for fixed-income trades and net amount to be paid or received be matched? What steps does or should the adviser take to ensure the affirming party, if not the adviser, is matching adviser-provided trade information against the broker or dealer confirmation before affirming trades?

42. When matching trade information on a given transaction between the investment adviser and the broker-dealer, the parties to the transaction may view differences, such as differences in amounts, as minor and therefore within a satisfactory ''tolerance'' range to match, whereas in other cases a party may be unwilling to match if any discrepancy in trade information exists. These differences in trade information may be perceived to be small in absolute terms or relative to the size of the trade. Parties also may set ''tolerance'' thresholds in their systems to ignore some differences, such as trade information where an element differs by ''one penny'' or less than 0.01% of the value being compared. To what extent do advisers apply such tolerances when matching trades? What fields are subject to such tolerance thresholds and what size tolerances are generally used? For example, if the net money for settlement as calculated by the adviser differs from the net money for settlement as calculated by the broker or dealer as part of the confirmation by a dollar, is that trade a ''match''? And if so, which value is used for settlement, the amount on the confirmation or the adviser's records? Does the other party then adjust its records to the amount used for settlement? Are investors ever harmed by this approach? Is there general consensus on tolerances? Are there industry groups that define guidelines or best practices on the use of tolerances and, if so, do they all agree?

43. Should advisers be expected to affirm trades or should this always be a

[169] For example, Financial Industry Regulatory Authority (''FINRA'') Rule 11860 does not require that a broker-dealer send a confirmation of trade details until the day after trade date, which can delay the affirmation process until T+1 (in a T+2 environment) and reduce the time available to manage trade exceptions. FINRA, as well as DTC and DTCC ITP Matching may propose new rules, procedures or services to further enhance the ability of market participants to settle in shorter timeframes.

[170] *See* T+1 Report, *supra* note 18, at 26.

function of the broker-dealer or bank custodian holding the account where securities will be delivered? How should the adviser proceed if the deadline to notify a broker-dealer or bank custodian is approaching yet a confirmation has not been received? If advisers delay notification of the custodian until after affirming the trade in such a scenario, will this create delays in recalling loaned securities or securities that may have been pledged as collateral?

44. In some cases, bank custodians may receive a copy of a confirmation (a "duplicate confirmation") as an early alert of potential trade activity. Are these duplicate confirmations relied upon to affirm the trade information? Do custodians ever settle trades based solely on information received in a duplicate confirmation? Should this practice be permitted? Please explain why or why not. Do custodians use these duplicate confirmations as an early alert to call a security back from being on loan or to identify a security that may be pledged as collateral?

45. Elements of FINRA Rule 11860 could be used to help facilitate compliance with proposed Rule 15c6–2, if adopted. Is proposed Rule 15c6–2 consistent with the approach to RVP/DVP settlement set forth in FINRA Rule 11860 and, more generally, the Uniform Practice Code ("UPC") set forth in the FINRA Rule 11000 series?[171] If not, please explain.

46. Should proposed Rule 15c6–2 have separate requirements and deadlines for each step in the allocation, affirmation, and confirmation processes? And if so, should deadlines be relative to a prior dependent activity? For example, should allocations be communicated within an hour of, or no later than three hours after, receipt of the notice of execution and affirmations be communicated within an hour of, or no later than three hours after, receipt of the confirmation? Or is it acceptable to require end of day for all activity? What changes would be recommended for a T+0 environment?

C. Proposed Amendment to Recordkeeping Rule for Investment Advisers

Under proposed Rule 15c6–2, a broker-dealer would be prohibited from entering into a contract on behalf of a customer for the purchase or sale of certain securities[172] unless it has entered into a written agreement with the customer that requires the allocation, confirmation, affirmation, or any combination thereof to be completed no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with proposed Rule 15c6–1(a).[173] Investment advisers, as customers of a broker or dealer, may become a party to such an agreement. Proposed Rule 15c6–2 does not specify which party would be obligated to provide the necessary allocation, confirmation, and affirmation, although the Commission understands that, generally, the customer (here, the investment adviser) customarily provides the broker or dealer with instructions directing how to allocate the securities to be purchased or sold, and the broker or dealer confirms the trade details, which the adviser, in turn, affirms.

Based on staff experience, the Commission believes that advisers generally have recordkeeping processes that include keeping originals and/or electronic copies of such allocations, confirmations, and affirmations. However, in some instances this may not be the case. Some activities, such as affirmation, may be performed on the adviser's behalf by a third party, such as middle-office outsourcing provider, a custodian or a prime broker, and advisers may not maintain these records.[174] In addition, based on staff experience, the Commission also believes that some advisers do not maintain these records or maintain them only in paper. Accordingly, the Commission is proposing an amendment to the investment adviser recordkeeping rule designed to ensure that registered investment advisers that are parties to contracts under proposed Rule 15c6–2 retain records of confirmations received, and keep records of the allocations and affirmations sent to a broker or dealer.[175] Specifically, the Commission proposes to amend Rule 204–2 under the Investment Advisers Act of 1940 (the "Advisers Act") by adding a requirement in paragraph (a)(7)(iii) that advisers maintain records of each confirmation received, and any allocation and each affirmation sent, with a date and time stamp for each allocation (if applicable) and affirmation that indicates when the allocation or affirmation was sent to the broker or dealer if the adviser is a party to a contract under proposed Rule 15c6–2. As with other records required under Rule 204–2(a)(7), advisers would be required to keep originals of confirmations, and copies of allocations and affirmations, described in the proposed rule, but may maintain records electronically if they satisfy certain conditions.[176]

While the Commission believes that retaining records of all of these documents is important, we understand that the timing of communicating allocations to the broker or dealer is a critical pre-requisite to ensure that confirmations can be issued in a timely manner, and affirmation is the final step necessary for an adviser to acknowledge agreement on the terms of the trade or alert the broker or dealer of a discrepancy. The proposed amendment to Rule 204–2 therefore would require advisers to time and date stamp records of any allocation and each affirmation. The proposed time and date stamp for these communications would occur when they were "sent to the broker or dealer." To meet this proposed requirement, an adviser generally should time and date stamp records of each allocation (if applicable) and affirmation to the nearest minute.

Based on staff experience, the Commission believes many advisers send allocations and affirmations electronically to brokers or dealers, and many records are already consistently date and time stamped to the nearest minute using either a local time zone or a centralized time zone, such as

[171] The UPC is a series of FINRA rules, interpretations and explanations designed to make uniform, where practicable, custom, practice, usage, and trading technique in the investment banking and securities business, particularly with regard to operational and settlement issues. These can include such matters as trade terms, deliveries, payments, dividends, rights, interest, reclamations, exchange of confirmations, stamp taxes, claims, assignments, powers of substitution, computation of interest and basis prices, due-bills, transfer fees, "when, as and if issued" trading, "when, as and if distributed" trading, marking to the market, and close-out procedures. The UPC was created so that the transaction of day-to-day business by members may be simplified and facilitated; that business disputes and misunderstandings, which arise from uncertainty and lack of uniformity in such matters, may be eliminated; and that the mechanisms of a free and open market may be improved and impediments thereto removed. *See, e.g.,* Exchange Act Release No. 91789 (May 7, 2021), 86 FR 26084, 26088 (May 12, 2021).

[172] As discussed in Part III.B.1, proposed Rule 15c6–2 would not apply to an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills.

[173] *See supra* Part III.B (discussing the proposed new requirement for "same-day affirmation").

[174] *See* DTCC ITP Forum Remarks, *supra* note 58 (stating that up to 70% of institutional trades are affirmed by custodians).

[175] *See* proposed Rule 204–2(a)(7)(iii), *infra* Part 0.

[176] *See* Rule 204–2(a)(7) (requiring making and keeping originals of all written communications received and copies of all written communications sent by an investment adviser relating to the records listed thereunder). *But see* Rule 204–2(g) (permitting advisers to maintain records electronically if they establish and maintain required procedures).

coordinated universal time, or ''UTC.'' [177] The Commission believes that date and time stamping these records to the nearest minute would evidence that the advisers have met their obligations to timely achieve a matched trade.

The Commission recognizes that requiring these records and adding time and date stamps to records would, however, add additional costs and burdens for those advisers that do not currently maintain these records or do not use electronic systems to send allocations and affirmations to brokers or dealers or maintain confirmations. For example, some advisers may incur costs to update their processes to accommodate these records. For advisers that use third parties to perform or communicate allocations or affirmations, they also could incur costs associated with directing the third parties to electronically copy the adviser on any allocations or affirmations.[178]

We believe that requiring these records and requiring a time and date stamp of all affirmations and any applicable allocations (but not confirmations) would help advisers establish that they have timely met contractual obligations under proposed Rule 15c6–2 and ultimately help ensure that trades involving such advisers would timely settle on T+1. In addition, we believe the proposed requirement would aid the Commission staff in preparing for examinations of investment advisers and assessing adviser compliance.

1. Request for Comment

We request comment on the proposed amendment to the investment adviser recordkeeping rule:

47. Should the Commission amend Rule 204–2 to specifically correspond to the proposed Rule 15c6–2 and require advisers that are parties to contracts under proposed Rule 15c6–2 to retain records of the documents described in that rule?

48. Should the Commission require that these records be retained under a different provision of the recordkeeping rule? For example, should the Commission instead amend Rule 204–2(a)(3) (requiring advisers to retain ''memorandums'' of orders) to explicitly include these records? If so, the determination of whether to maintain the relevant allocations, confirmation, and affirmations would depend on if they were part of an ''order.'' Given that certain orders may never be executed, and that certain executed trades potentially might not have orders associated with them, would including the requirement in the recordkeeping requirement related to ''orders'' result in advisers not retaining some allocations, confirmations, and affirmations? Separately, would maintaining the proposed records under Rule 204–2(a)(3) create confusion about whether advisers need to maintain originals and/or duplicate copies of relevant allocations, confirmations, and affirmations, when the specified record is the memorandum? Or, do advisers currently maintain records of allocations, confirmations, and affirmations under this provision to document the orders they describe in the memoranda?

49. Should the Commission require time and date stamping of the allocations and affirmations to the nearest minute, as proposed? Would advisers need to make system changes to accomplish such time and date stamping of allocations and affirmations? Is there an approach other than time and date stamping that would allow Commission staff to verify that an adviser has completed the steps necessary to facilitate settlement in a timely manner? Should the Commission require time and date stamping of just the affirmation or just the allocation? Is the requirement to time and date stamp the allocation or affirmation when it is ''sent to the broker or dealer'' clear? Should we require the time and date stamp at a different point in time? If so, when?

50. Should we require time and date stamping of receipt of the confirmation as well? What additional costs or burdens would such time stamping incur?

51. Under what circumstances do third parties, such as prime brokers or custodians, affirm trades instead of advisers, and in those instances do the third parties send copies of the affirmations to the advisers? Does this happen for all accounts an adviser manages or only some accounts and why?

52. If advisers are matching adviser records to confirmations, some trades will not match. In other instances, an adviser may receive a confirmation for a trade that the adviser does not ''know,'' such as when an adviser did not execute a trade or when the adviser's trading desk has not notified the adviser's middle or back office. In such cases, do advisers proactively notify the broker-dealer that the trade does not match (often referred to as ''don't know'' or sending a ''DK'')? Should the proposed rule be more specific about recordkeeping when an adviser does not agree with or does not ''know'' a trade for which a confirmation was received? How often do trades not match? How frequently do advisers receive confirmations they do not ''know?''

D. New Requirement for CMSPs To Facilitate Straight-Through Processing

Because of the rising volume of transactions for which CMSPs provide matching and other services,[179] CMSPs have become increasingly critical to the functioning of the securities market.[180] As described in Part II.B.1, CMSPs facilitate communications among a broker-dealer, an institutional investor or its investment adviser, and the institutional investor's custodian to reach agreement on the details of a securities transaction, enabling the trade allocation, confirmation, affirmation, and/or the matching of institutional trades. Once the trade details have been agreed among the parties or matched by the CMSP, the CMSP can then facilitate settlement of the transaction.

While the introduction of new technologies and streamlined operations such as those offered by CMSPs have improved the efficiency of post-trade processing over time, the Commission believes more should be done to facilitate further improvements, particularly with respect to the processing of institutional trades. Currently, some SRO rules require the use of CMSP services for institutional

[177] *See* U.S. Naval Observatory, Systems of Time, *https://www.cnmoc.usff.navy.mil/Organization/United-States-Naval-Observatory/Precise-Time-Department/The-USNO-Master-Clock/Definitions-of-Systems-of-Time/.* The Commission understands that some firms have systems that date and time stamp records with greater precision. Certainly as volumes increase and the timeframes to complete operational activities, such as settlement, shorten, the Commission believes from a practical perspective that many firms will find value in having increased precision in the time stamps on trade-related activities.

[178] For additional discussion on this and other initial costs and burdens of the proposed amendment to Rule 204–2, *see infra* Part V.C.5.b).

[179] *See, e.g.,* Press Release, DTCC, Over 1,800 Firms Agree to Leverage U.S. Institutional Trade Matching Capabilities in DTCC's CTM (Oct. 12, 2021), *https://www.dtcc.com/news/2021/october/12/over-1800-firms-agree-to-leverage-dtccs-ctm;* DTCC's Trade Processing Suite Traffics One Billion Trades, Traders Magazine (Feb. 13, 2017), *https://www.tradersmagazine.com/departments/clearing/dtccs-trade-processing-suite-traffics-one-billion-trades/.*

[180] CMSPs are clearing agencies as defined in Section 3(a)(23) of the Exchange Act, and as such, are required to register as a clearing agency or obtain an exemption from registration. The Commission has currently exempted three CMSPs from the registration requirement. The Commission also has adopted rules that apply to both registered and exempt clearing agencies, including CMSPs operating pursuant to an exemption from registration. *See, e.g.,* Regulation Systems Compliance and Integrity, Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252 (Dec. 5, 2014) (''Regulation SCI Adopting Release'').

trade processing.[181] The Commission has previously explained that a shortened settlement cycle may lead to expanded use of CMSPs, as well as increased focus on enhancing the services and operations of the CMSPs themselves.[182] In particular, the Commission believes that eliminating the use of tools that encourage or require manual processing, alongside the continued development and implementation of more efficient automated systems in the institutional trade processing environment, is essential to reducing risk and costs to ensure the prompt and accurate clearance and settlement of securities transactions.[183] Below is a discussion of the elements of the proposed rule.

1. Policies and Procedures To Facilitate Straight-Through Processing

Proposed Rule 17Ad–27 would require a CMSP to establish, implement, maintain and enforce policies and procedures to facilitate straight-through processing for transactions involving broker-dealers and their customers.

The term ''straight-through processing'' generally refers to processes that allow for the automation of the entire trade process from trade execution through settlement without manual intervention.[184] In the context of institutional trade processing under this rule, straight-through processing occurs when a market participant or its agent uses the facilities of a CMSP to enter trade details and completes the trade allocation, confirmation, affirmation, and/or matching processes without manual intervention. Under the rule, a CMSP facilitates straight-through processing when its policies and procedures enable its users to minimize or eliminate, to the greatest extent that is technologically practicable, the need for manual input of trade details or manual intervention to resolve errors and exceptions that can prevent settlement of the trade. A CMSP also facilitates straight-through processing when it enables, to the greatest extent that is technologically practicable, the transmission of messages regarding errors, exceptions, and settlement status information among the parties to a trade and their settlement agents. Under the rule, policies and procedures generally should establish a holistic framework for facilitating straight-through processing, as just described, on a CMSP-wide basis. CMSPs should also generally consider and address how the services, systems, and any operational requirements a CMSP applies to its users ensure that the CMSP's policies and procedures advance the goal of achieving straight-through processing for trades processed through it. For example, a CMSP's policies and procedures generally should explain the criteria that the CMSP applies to determine when a ''match'' has been achieved, including any relevant tolerances that it or its users might apply to achieve a match, and the extent to which such criteria should be standardized or customized. With respect to the use of electronic trade confirmation services, which often rely on legacy technologies, a CMSP's policies and procedures generally should establish a timeline for transitioning users away from manual processes to matching services that reduce a party's reliance on the manual, often sequential, entry and reconciliation of trade information.

The Commission believes that increasing the efficiency of using a CMSP can reduce the risk that a trade will fail to settle, as well as the costs associated with correcting errors that result from the use of manual processes and data entry, thereby improving the overall efficiency of the National C&S System. CMSPs have become increasingly connected to a wide variety of market participants in the U.S.,[185] increasing the need to reduce risks and inefficiencies that may result from use of a CMSP's services. Because the proposed rule would preclude reliance on service offerings at CMSPs that rely on manual processing, the Commission preliminarily believes the proposed rule will better position CMSPs to provide services that not only reduce risk generally but also help facilitate an orderly transition to a T+1 standard settlement cycle,[186] as well as potential further shortening of the settlement cycle in the future.

The Commission has taken a ''policies and procedures'' approach in developing the proposed rule because it preliminarily believes such an approach will remain effective over time as CMSPs consider and offer new technologies and operations to improve the settlement of institutional trades. The Commission also believes that improving the CMSP's systems to facilitate straight-through processing can help market participants consider additional ways to make their own systems more efficient. In addition, a ''policies and procedures'' approach can help ensure that a CMSP considers in a holistic fashion how the obligations it applies to its users will advance the implementation of methodologies, operational capabilities, systems, or services that support straight-through processing.

In considering how to develop policies and procedures that facilitate straight-through processing, a CMSP generally should consider the full range of operations and services related to the processing of institutional trades for settlement. For example, as noted above, the CMSP often acts as a communication platform for different market participants to transmit messages regarding errors, exceptions, and settlement status information among the parties to a trade and their settlement agents. Under proposed Rule 17Ad–27, a CMSP also generally should consider the extent to which its policies, procedures, and processes restrict, inhibit, or delay the ability of users to transmit such messages to any agent that assists said users in preparing or submitting the trade for settlement. In the Commission's view, the CMSP generally should consider having policies and procedures that promote the onward transmission of messages among the relevant parties to a transaction to ensure timely settlement and reduce the potential for errors. Similarly, in structuring its process for submitting transactions for settlement, the CMSP generally should consider ensuring that its systems, operational requirements, and the other choices it makes in designing its services enable and incentivize prompt and accurate settlement without manual intervention.

As explained above, the Commission recognizes it may not be technologically or operationally practicable to eliminate all manual processes immediately. Indeed, the Commission believes that in certain circumstances, the parties to a trade may need to engage in manual interventions to ensure the accuracy of trade information and minimize operational or other risks that may prevent settlement, and proposed Rule 17Ad–27 does not require CMSPs to remove a manual processes if doing so would clearly undermine the prompt and accurate clearance and settlement of

---

[181] *See e.g.,* FINRA Rule 11860 (requiring a broker-dealer to use a registered clearing agency, a CMSP, or a qualified vendor to complete delivery-versus-payment transactions with their customers).

[182] T+2 Proposing Release, *supra* note 30, at 69258.

[183] *See* T+1 Report, *supra* note 18, at 9.

[184] *See* SIA Business Case Report, *supra* note 21, at app. E (defining ''straight-through processing'').

[185] *See, e.g.,* DTCC, About DTCC Institutional Trade Processing, *https://www.dtcc.com/about/businesses-and-subsidiaries/dtccitp* (noting that DTCC ITP, parent to DTCC ITP Matching, serves 6,000 financial services firms in 52 countries).

[186] As discussed in Part III.B.2, the T+1 Report contemplates moving the ''ITP Affirmation Cutoff'' from 11:30 a.m. on the day after trade date to 9:00 p.m. on trade date. *See supra* note 164. Proposed Rule 17Ad–27 is consistent with, and should help promote, efforts to shorten the processing time for institutional trades in a T+1 environment.

securities transactions. However, pursuant to the policies and procedures approach described above, where a CMSP continues to permit manual reconciliation or other types of human intervention, it generally should explain in its policies and procedures why those manual processes remain necessary as part of its systems and processes. In addition, the CMSP should consider developing processes that ultimately would eliminate the underlying issues that drive the use of manual processes in order to facilitate a more automated approach.

2. Annual Report on Straight-Through Processing

Proposed Rule 17Ad–27 also would require a CMSP to submit every twelve months to the Commission a report that describes the following: (a) The CMSP's current policies and procedures for facilitating straight-through processing; (b) its progress in facilitating straight-through processing during the twelve month period covered by the report; and (c) the steps the CMSP intends to take to facilitate and promote straight-through processing during the twelve month period that follows the period covered by the report. The Commission preliminarily intends to make this annual report publicly available on its website to enable the public to review and analyze progress on achieving straight-through processing. A CMSP would submit this report to the Commission using the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR''), and would tag the information in the report using the structured (*i.e.,* machine-readable) Inline eXtensible Business Reporting Language (''XBRL'').[187]

The Commission believes that the proposed reporting requirement would enable the Commission to evaluate actions taken by the CMSP to ensure compliance with the rule and to help fulfill the Commission's responsibility for oversight of the National C&S System, both as it relates to the CMSP specifically and the National C&S System more generally. The proposed requirement would also inform the Commission and the public, particularly the direct and indirect users of the CMSP, as to the progress being made each year to advance implementation of straight-through processing with respect to the allocation, confirmation, affirmation, and matching of institutional trades, the communication of messages among the parties to the transactions, and the availability of service offerings that reduce or eliminate the need for manual processing. In particular, the Commission preliminarily believes that a CMSP generally should include in its report a summary of key settlement data relevant to its straight-through processing objective. Such data could include the rates of allocation, confirmation, affirmation, and/or matching achieved via straight-through processing. In describing its progress in facilitating straight-through processing, the CMSP could also identify common or best practices that facilitate straight-through processing. In addition, after the CMSP has submitted its initial report, in subsequent years a CMSP generally should include in its report an assessment of how its progress in facilitating straight-through processing during the twelve month period covered by the report under paragraph (b) compares to the steps it intended to take to facilitate straight-through processing under paragraph (c) from the prior year's report.

Because this information would be useful to the industry and the general public in considering potential ways to increase the availability of straight-through processing, the Commission believes that the report should be made public. The Commission preliminarily believes that the proposed requirement generally would not require the disclosure of proprietary information, trade secrets, or personally identifiable information. To the extent that an annual report includes confidential commercial or financial information, a CMSP could request confidential treatment of those specific portions of the report.[188]

As the National C&S System continues to evolve, the Commission believes that CMSPs will continue to play an increasingly critical role in efforts to facilitate the prompt and accurate clearance and settlement of securities transactions and to eliminate inefficient and costly procedures that effect the settlement of securities transactions, particularly institutional transactions. Furthermore, because of the CMSP's role in submitting matched or confirmed and affirmed trades for overnight positioning of settling transactions, the Commission believes that a CMSP generally should evaluate how it participates in that process and consider how it can support improvements to the timing and manner of settlement obligations (*e.g.,* intraday) to increase efficiency in the National C&S System.

Requiring CMSPs to file the reports on EDGAR would provide the Commission and the public with a centralized, publicly accessible electronic database for the reports, facilitating the use of the reported data on straight-through processing. Moreover, requiring Inline XBRL tagging of the reported disclosures, which would specifically comprise an Inline XBRL block text tag for each of the three required narrative disclosures as well as detail tags for individual data points, would make the disclosures more easily available and accessible to and reusable by market participants and the Commission for retrieval, aggregation, and comparison across different CMSPs and time periods, as compared to an unstructured PDF, HTML, or ASCII format requirement for the reports.[189] Detail tags could be helpful to the extent the reports disclose individual data points, including the rates of allocation, confirmation, affirmation, and/or matching achieved via straight-through processing.

The Commission is proposing a 12-month requirement in the rule because the Commission preliminarily believes that a yearly review and report on progress with respect to straight-through processing is the appropriate timescale on which the CMSP should consider, develop, and implement iterative improvements over time, while also ensuring that progress towards straight-through processing is expeditious. Specifically, a 12-month period would provide the CMSP with a sufficient look-back period to complete a meaningful review on an organization-wide basis and time to test and implement material changes to technologies and procedures. An annual reporting requirement, as opposed to a monthly or semi-annual requirement, should help ensure that the information provided to the Commission reflects meaningful and substantive progress by the CMSP, as opposed to focusing the Commission's attention on smaller, technical changes in services and policies that would be less relevant to improving the Commission's understanding of the overall progress towards achieving straight-through processing by the CMSP. The

[187] This requirement would be implemented by including a cross-reference to Regulation S–T in proposed Rule 17Ad–27, and by revising Regulation S–T to include the proposed straight-through processing reports. Pursuant to Rule 301 of Regulation S–T, the EDGAR Filer Manual is incorporated by reference into the Commission's rules. In conjunction with the EDGAR Filer Manual, Regulation S–T governs the electronic submission of documents filed with the Commission.

[188] *See* 17 CFR 240.24b–2.

[189] *See* Release No. 33–10514 (June 28, 2018), 83 FR 40846, 40847 (Aug. 16, 2018). Inline XBRL allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit. *Id.* at 40851.

Commission believes that the reporting requirement should continue indefinitely because changes in technology will require ongoing review and consideration of how such changes might impact policies and procedures to facilitate straight-through processing.

3. Request for Comment

The Commission requests comment on all aspects of proposed Rule 17Ad–27, as well as the following specific topics:

53. Is the proposed policies and procedures approach appropriate and sufficient to achieve the proposed rule's stated objectives? Why or why not? Would more specific or directive requirements, such as those discussed above be more effective at facilitating straight-through processing than the proposed policies and procedures approach? Please explain why or why not.

54. Is proposed Rule 17Ad–27 consistent with the approach to RVP/DVP settlement set forth in FINRA Rule 11860 and, more generally, the UPC set forth in the FINRA Rule 11000 series?[190] If not, please explain.

55. Is the proposed use of the term ''straight-through processing'' clear and understandable? Why or why not? Should the Commission define the term for purposes of the proposed rule? If so, please describe the elements that the Commission should consider including in the definition to make it clear and understandable.

56. Should the Commission require a CMSP to enable the users of its service to complete the matching, confirmation, or affirmation of securities transactions as soon as technologically practicable? Alternatively, should the Commission impose a specific deadline on such a requirement, such as requiring that these processes be completed within a certain number of minutes or hours? Should the Commission require specific deadlines, when using a CMSP, for completing each of the allocation, confirmation, affirmation, or matching processes? Why or why not? If the Commission were to impose a specific deadline, what would be the appropriate deadline for each process—allocation, confirmation, affirmation, and matching?

57. Should the Commission require a CMSP to forward or otherwise submit a transaction for settlement as soon as technologically and operationally practicable, as if using fully automated systems? Should the Commission specify to whom a CMSP should forward such information to facilitate straight-through processing? To what extent do CMSPs not forward such trade information as soon as technologically practicable? Are certain parties excluded? What are the reasons preventing such forwarding of trade information?

58. Is it appropriate for proposed Rule 17Ad–27 to require a CMSP to retire any electronic trade confirmation services, where the users of a CMSP may transmit sequential messages back and forth to achieve allocation, confirmation, and affirmation of a transaction? If so, should the rule be modified to accommodate electronic trade confirmation services offered by CMSPs? Why or why not?

59. More generally, are electronic trade confirmation services consistent with the concept of ''straight-through processing?'' Why or why not? Please explain.

60. With regard to the proposed requirement for a CMSP to provide an annual report, does the proposed rule include the appropriate aspects or level of detail that should be included in such a report? Why or why not? Should the Commission require that the public report be issued in a machine-readable data language? Why or why not?

61. Are the time periods (*i.e.,* every 12 months) described in the rule concerning the submission and content of the annual report sufficiently clear? If not, please explain.

62. Should a CMSP be required to tag its annual report using Inline XBRL? Why or why not? Rather than requiring block text tags for the narrative disclosures as well as detail tags of individual data points (including those nested within the narrative disclosures), should we only require block text tags for the narrative disclosures? Should the annual report be tagged in an open structured data language other than Inline XBRL? If so, what open structured data language should be used and why?

63. Is EDGAR an appropriate submission mechanism for the annual report? Why or why not? Should the Commission use an alternative submission mechanism, such as the Electronic Form Filing System (''EFFS'')? An EFFS submission requirement would not be compatible with a requirement to use Inline XBRL or other open structured data language for the annual report.

64. Should the Commission make public the annual report required to be submitted to the Commission under the proposed rule? Why or why not? Would making the report public alter the type or detail of information included by the CMSP in the report or in its policies and procedures? If so, why? If the public availability of any information required under the proposed rule would raise issues related to confidentiality or the proprietary nature of the CMSP's operations, please explain.

65. CMSPs generally allow their users to define the criteria that will constitute a ''match,'' and the users may set different tolerances under those criteria depending on their business strategy. Should a CMSPs be required to disclose in the annual report its matching criteria? Should a CMSP be required to disclose data regarding confirmations, affirmations, and/or matches in its annual report, such as the percentage of successful confirmations, affirmations, and/or matches achieved on trade date, or the average time users take to achieve confirmation, affirmation, and/or a match from trade submission? Should a CMSP be required to disclose any other data to help facilitate straight-through processing, such as average time to submit a trade to a registered clearing agency for settlement, or the average number of messages that a CMSP transmits among the parties to a trade before the trade is submitted to a registered clearing agency for settlement? Please explain.

66. More generally, should CMSPs be required to make their policies and procedures for straight-through processing public? Please explain why or why not?

67. The Commission has issued exemptive orders for three CMSPs, pursuant to which each CMSP is subject to a series of operational and interoperability conditions.[191] Should the Commission amend the respective exemptive orders to add conditions similar to the proposed requirements in Rule 17Ad–27 instead of adopting this proposal? Why or why not?

68. In the Matching Release, the Commission stated that, even though matching services fall within the Exchange Act definition of ''clearing agency,'' it was of the view that an entity that limits its clearing agency functions to providing matching services need not be subject to the full panoply of clearing agency regulation.[192] The Commission offered two alternative approaches for regulation: Limited registration or conditional exemptions. Since the Matching Release, the Commission has approved three conditional exemptions

[190] *See supra* note 171 and accompanying text (describing the UPC).

[191] *See supra* note 32 (providing citations to the exemptive orders for DTCC ITP Matching, BSTP, and SS&C).

[192] Exchange Act Release No. 39829 (Apr. 6, 1998), 63 FR 17943, 17947 (Apr. 13, 1998) (''Matching Release'').

for CMSPs, as noted in the above question, with the goal of facilitating competition in the provision of matching services.[193] Has the Commission's approach to the regulation of CMSPs facilitated competition in the provision of matching services? If so, why or why not? To what extent does competition among CMSPs help promote either a shortened settlement cycle or straight-through processing? Please explain.

69. Are there any other steps that the Commission should take to enhance the ability of the CMSPs to promote straight-through processing or increase efficiency in the settlement of securities transactions?

E. Impact on Certain Commission Rules and Guidance and SRO Rules

The proposed rules and rule amendments may affect compliance with other existing Commission rules and guidance that reference the settlement cycle or settlement processes in establishing requirements for market participants. Below is a preliminary list of rules identified by the Commission. The Commission preliminarily believes that no changes to these rules are necessary to adopt the proposed rules. The Commission solicits comment on the potential impacts of shortening the settlement cycle to T+1 on each of the below rules.

1. Regulation SHO Under the Exchange Act

As with the adoption of a T+2 standard settlement cycle, several provisions of Regulation SHO may be impacted by shortening the settlement cycle to T+1 because certain provisions use ''trade date'' and ''settlement date'' to determine the timeframes for compliance relating to sales of equity securities and fails to deliver on settlement date. Since these references are not to a particular settlement cycle (*e.g.,* ''T+2''), the timeframes for these provisions change in tandem with changes in the standard settlement cycle.

(a) Rule 204

Shortening the standard settlement cycle to T+1 would reduce the timeframes to effect the closeout of a fail-to-deliver position under 17 CFR 242.204 (''Rule 204'').[194] Under Rule 204,[195] a participant of a registered clearing agency must deliver securities to a registered clearing agency for clearance and settlement on a long or short sale in any equity security by settlement date, or if a participant has a fail-to-deliver position, the participant shall, by no later than the beginning of regular trading hours on the applicable closeout date, immediately close out the fail-to-deliver position by borrowing or purchasing securities of like kind and quantity.[196]

The applicable closeout date for a fail-to-deliver position differs depending on whether the position results from a short sale, a long sale, or bona fide market making activity. If a fail-to-deliver position results from a short sale, the participant must close out the fail-to-deliver position by no later than the beginning of regular trading hours on the settlement day following the settlement date.[197] Under the current T+2 standard settlement cycle, the applicable closeout date for short sales is required by the beginning of regular trading hours on T+3. In a T+1 settlement cycle, the existing closeout requirement for fail-to-deliver positions resulting from short sales would be reduced from T+3 to T+2.[198]

If a fail-to-deliver position results from a long sale or bona fide market making activity, the participant must close out the fail-to-deliver position by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date.[199] Under the current T+2 standard settlement cycle, the closeout for long sales or bona fide market making activity is required by the beginning of regular trading hours on T+5. If the Commission adopts a T+1 standard settlement cycle, this closeout requirement would be shortened from T+5 to T+4.

(b) Rule 200(g)

Shortening the standard settlement cycle to T+1 may also impact the application of 17 CFR 242.200(g) (''Rule 200(g)''). Specifically, a T+1 settlement cycle may change when a broker-dealer would need to initiate a bona fide recall of a loaned security to be able to mark the sale of such loaned but recalled security ''long'' for purposes of Rule 200(g)(1). Under Rule 200(g), a broker-dealer must mark all sell orders of any equity security as ''long,'' ''short,'' or ''short exempt.''[200] Rule 200(g)(1) stipulates that a broker-dealer may only mark a sale as ''long'' if the seller is ''deemed to own'' the security being sold under 17 CFR 242.200 (a) through (f) and either (i) the security is in the broker-dealer's physical possession or control; or (ii) it is reasonably expected that the security will be in the broker-dealer's possession or control by settlement of the transaction.[201]

The Commission has provided guidance on when a person that sells a loaned but recalled security would be ''deemed to own'' the security and be able to mark the sale ''long.''[202] The guidance was given when the standard settlement cycle was T+3. Under those circumstances, the Commission indicated that, if a person that has loaned a security to another person sells the security and a bona fide recall of the security is initiated within two business days after trade date, the person that has loaned the security will be ''deemed to own'' the security for purposes of Rule 200(g)(1), and such sale will not be treated as a short sale for purposes of Rule 204. The Commission also stated that a broker-dealer may mark such orders as ''long'' sales provided such marking is also in compliance with Rule 200(c) of Regulation SHO, and thus the closeout requirement of Rule 204.[203]

This guidance was predicated on the Commission's belief that, under then current industry standards, recalls for loaned securities would likely be delivered within three business days after the initiation of a recall. In that case, a broker-dealer that initiated a bona fide recall by T+2 would receive delivery of loaned securities by T+5 and then be able to close out any failure to deliver on a ''long'' sale of the loaned but recalled securities by the beginning of regular trading hours on T+6, as then required by Rule 204 in a T+3 environment.

Under a T+2 standard settlement cycle, the closeout period for sales marked ''long'' is T+5, and so recalls of loaned securities need to be delivered by T+4 to be available to close out any fails on sales marked ''long'' by the beginning of regular trading hours on

[193] *See, e.g.,* BSTP and SS&C Order, *supra* note 32, at 75397–400 (noting the Commission's interest in facilitating competition among CMSPs).

[194] 17 CFR 242.204.

[195] For purposes of Regulation SHO, the term ''participant'' has the same meaning as in Section 3(a)(24) of the Exchange Act, 15 U.S.C. 78c(a)(24). *See* Amendments to Regulation SHO, Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266, 38268 n.34 (July 31, 2009) (''Rule 204 Adopting Release''). Section 3(a)(24) of the Exchange Act defines ''participant'' to mean, when used with respect to a clearing agency, any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities. Such term does not include a person whose only use of a clearing agency is (A) through another person who is a participant or (B) as a pledgee of securities.

[196] 17 CFR 242.204(a).

[197] *Id.*

[198] *See* 17 CFR 242.204(g)(1).

[199] *See* 17 CFR 242.204(a)(1), (a)(3).

[200] *See* 17 CFR 242.200(g).

[201] *See* 17 CFR 242.200(g)(1).

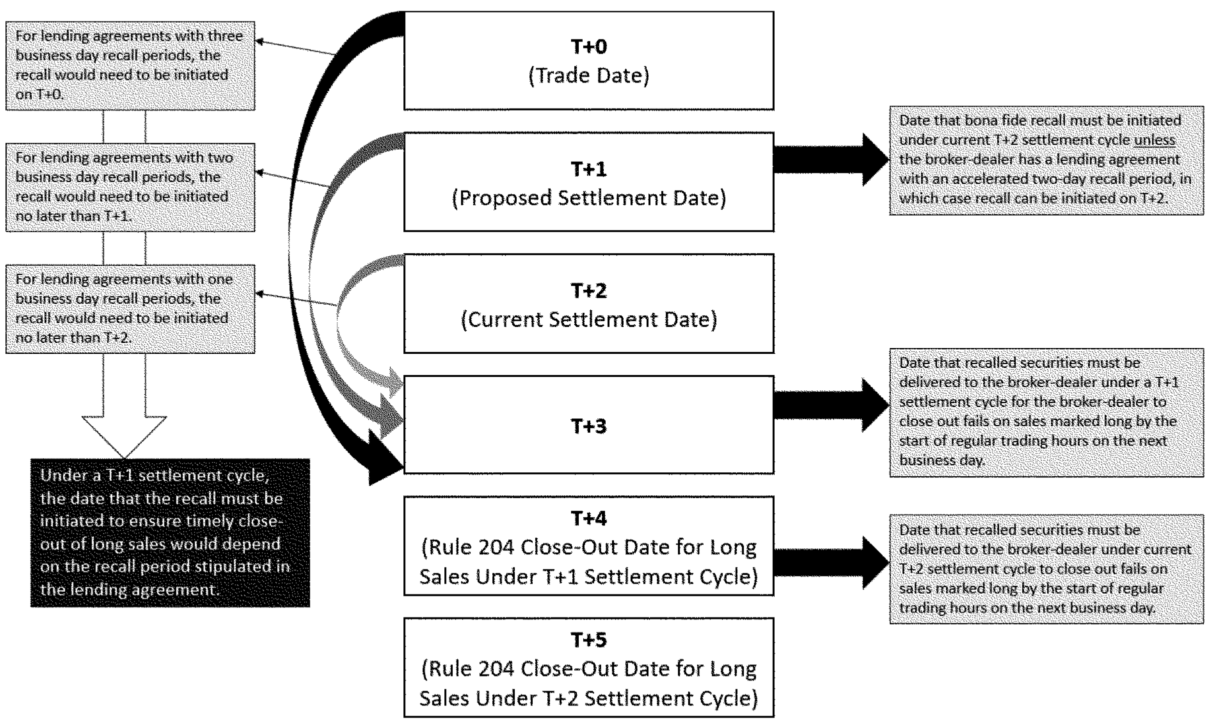
[202] See Rule 204 Adopting Release, *supra* note 195, at n.55.

[203] *See id.; see also* 17 CFR 242.200(c).

T+5. To meet this timeframe, a number of broker-dealers have securities lending agreements that set the period of delivery for delivering loaned but recalled securities to two settlement days after initiation of a recall. Under such an agreement, a bona fide recall by no later than T+2 would result in the delivery of such loaned securities by T+4 and in time to close out any fails on sales marked long by the beginning of regular trading hours on T+5. For those broker-dealers that lend securities pursuant to securities lending agreements that have a recall period of three business days after recall, a broker-dealer would need to initiate a bona fide recall by T+1 to receive delivery of the loaned security by T+4 and in time to close out any fails on sales marked long by the beginning of regular trading hours on T+5.

If a T+1 settlement cycle is implemented, closeout of a failure of a sale marked ''long'' would be required by the beginning of regular trading hours on T+4. With this further shortened timeframe, recalls of loaned securities would need to be delivered by T+3 to be available to close out any fails on sales marked ''long'' by the beginning of regular trading hours on T+4. Accordingly, under a T+1 settlement cycle, broker-dealers that lend securities pursuant to a recall period of three business days would need to initiate a bona fide recall on trade date (*i.e.,* T+0), and those brokers that lend securities pursuant to a recall period of two business days would need to initiate a bona fide recall by T+1, in order to close out any failure to deliver on sales marked ''long'' by the beginning of regular trading hours in T+4. The Commission understands, however, that under a T+1 standard settlement cycle, at least some broker-dealers would be likely to modify their securities lending agreements to shorten the recall period to one settlement day after the initiation of the recall.[204] Under such agreements, a bona fide recall would need to be initiated by T+2 in order to meet the applicable closeout period for long sales. Figure 4 provides a diagram of close-out scenarios in a T+1 environment.

***Figure 4**. Close-out scenarios under Regulation SHO in a T+1 environment.*



2. Financial Responsibility Rules Under the Exchange Act

Certain provisions of the Commission's broker-dealer financial responsibility rules [205] reference explicitly or implicitly the settlement date of a securities transaction. For example, paragraph (m) of Exchange Act Rule 15c3–3 references the settlement date to prescribe the timeframe in which a broker-dealer must complete certain sell orders on behalf of customers.[206] Specifically, Rule 15c3–3(m) provides that if a broker-dealer executes a sell order of a customer (other than an order to execute a sale of securities which the seller does not own) and if for any reason whatever the broker-dealer has not obtained possession of the securities from the customer within ten business days after the settlement date, the broker-dealer must immediately close the transaction with the customer by purchasing securities of like kind and quantity.[207] In addition, settlement date is incorporated into paragraph (c)(9) of Exchange Act Rule 15c3–1,[208] which

[204] *See* T+1 Report, *supra* note 18, at 24–25.

[205] For purposes of this release, the term ''financial responsibility rules'' includes any rule adopted by the Commission pursuant to Sections 8, 15(c)(3), 17(a) or 17(e)(1)(A) of the Exchange Act, any rule adopted by the Commission relating to hypothecation or lending of customer securities, or any rule adopted by the Commission relating to the protection of funds or securities. The Commission's broker-dealer financial responsibility rules include 17 CFR 240.15c3–1, 15c3–3, 17a–3, 17a–4, 17a–5, 17a–11, and 17a–13.

[206] 17 CFR 240.15c3–3(m).

[207] However, paragraph (m) of Rule 15c3–3 provides that the term ''customer'' for the purpose of paragraph (m) does not include a broker or dealer who maintains an omnibus credit account with another broker or dealer in compliance with Rule 7(f) of Regulation T (12 CFR 220.7(f)).

[208] 17 CFR 240.15c3–1(c)(9).

defines what it means to ''promptly transmit'' funds and ''promptly deliver'' securities within the meaning of paragraphs (a)(2)(i) and (a)(2)(v) of Rule 15c3–1.[209] The concepts of promptly transmitting funds and promptly delivering securities are incorporated in other provisions of the financial responsibility rules as well, including paragraphs (k)(1)(iii), (k)(2)(i), and (k)(2)(ii) of Rule 15c3–3,[210] paragraph (e)(1)(A) of Rule 17a–5,[211] and paragraph (a)(3) of Rule 17a–13.[212]

The Commission acknowledges that shortening the standard settlement cycle to T+1 will effectively reduce the number of days (from 12 business days to 11 business days) that a broker-dealer will have to obtain possession of customer securities before being required to close out a customer transaction under Rule 15c3–3(m). The operations supporting the processing of customer orders by broker-dealers and the technology supporting those operations have developed substantially since 1972, when the Commission adopted paragraph (m) of Rule 15c3–3.[213] Based on staff experience, the Commission believes that these developments have resulted in a lower frequency of broker-dealers failing to obtain possession of the securities from their customers within 10 business days after the settlement date. Therefore, the Commission believes that these developments in technology and broker-dealer operations diminish the potential for customers to be adversely affected by the change from 12 business days to 11 business days. Accordingly, the Commission believes that the change from 12 business days to 11 business days would not materially burden broker-dealers or their customers,[214] and the Commission believes that it is unnecessary to amend Rule 15c3–3(m), or any of the broker-dealer financial responsibility rules, at this time.

The Commission solicits comment regarding the effect that shortening the standard settlement cycle from T+2 to T+1 could have on the ability of broker-dealers to comply with the Commission's financial responsibility rules.

[209] 17 CFR 240.15c3–1(a)(2)(i), (a)(2)(v).

[210] 17 CFR 240.15c3–3(k)(1)(iii), (k)(2)(i)–(ii).

[211] 17 CFR 240.17a–5(e)(1)(A).

[212] 17 CFR 240.17a–13(a)(3).

[213] *See* Broker-Dealers; Maintenance of Certain Basic Reserves, Exchange Act Release No. 9856 (Nov. 10, 1972), 37 FR 25224 (Nov. 29, 1972) (''Rule 15c3–3 Adopting Release'').

[214] *See infra* Part V.C.3 (discussing the economic implications of shortening the settlement cycle on Rule 15c3–3).

3. Rule 10b–10 Under the Exchange Act

Providing customers with confirmations pursuant to Rule 10b–10 serves a significant investor protection function.[215] Confirmations provide customers with a means of verifying the terms of their transactions, alerting investors to potential conflicts of interest with their broker-dealers, acting as a safeguard against fraud, and providing investors a means to evaluate the costs of their transactions and the quality of their broker-dealers' execution.[216]

Although Rule 10b–10 does not directly refer to the settlement cycle, it requires that a broker-dealer send a customer a written confirmation disclosing specified information ''at or before completion'' of the transaction, which Rule 10b–10 defines to have the meaning provided in the definition of the term in Rule 15c1–1 under the Exchange Act.[217] Generally, Rule 15c1–1 defines ''completion of the transaction'' to mean the time when: (i) A customer purchasing a security pays for any part of the purchase price after payment is requested or notification is given that payment is due; (ii) a security is delivered or transferred to a customer who purchases and makes payment for it before payment is requested or notification is given that payment is due; (iii) a security is delivered or transferred to a broker-dealer from a customer who sells the security and delivers it to the broker-dealer after delivery is requested or notification is given that delivery is due; or (iv) a broker-dealer makes payment to a customer who sells a security and delivers it to the broker-dealer before delivery is requested or notification is given that delivery is due.[218]

When first adopting Rule 15c6–1 in 1993 to establish a T+3 settlement cycle, the Commission noted that broker-dealers typically send customer confirmations on the day after the trade date.[219] When adopting a T+2 settlement cycle in 2017, the Commission stated that, while broker-dealers may continue to send physical customer confirmations on the day after the trade date, broker-dealers may also send electronic confirmations to customers on the trade date. Accordingly, the Commission noted its belief that implementation of a T+2 settlement cycle would not create problems with regard to a broker-dealer's ability to comply with the requirement under Rule 10b–10 to send a confirmation ''at or before completion'' of the transaction, but acknowledged that broker-dealers would have a shorter timeframe to comply with the requirements of Rule 10b–10 in a T+2 settlement cycle.[220] With respect to a T+1 standard settlement cycle, the Commission similarly believes that T+1 would not create a compliance issue for broker-dealers under Rule 10b–10, although broker-dealers would have a further shortened timeframe to do so in a T+1 settlement cycle. In addition, as explained in Part III.D, proposed Rule 15c6–2 also would not alter the requirements of Rule 10b–10.[221]

[215] 17 CFR 240.10b–10.

[216] *See* Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts, Exchange Act Release No. 46471 (Sept. 6, 2002), 67 FR 58302, 58303 (Sept. 13, 2002).

[217] *See* 17 CFR 240.10b–10(d)(2).

[218] *See* 17 CFR 240.15c1–1(b).

[219] T+3 Adopting Release, *supra* note 9, at 52908.

The Commission solicits comment on the extent to which the T+1 rule proposals may impact compliance with Rule 10b–10. In the T+1 Report, the ISC recommends clarifying what constitutes ''delivery'' for electronic confirmations under Rule 10b–10. The Commission has previously provided such guidance.[222] The Commission therefore solicits comment on whether this guidance needs to be updated in a T+1 environment.

[220] T+2 Adopting Release, *supra* note 10, at 15579.

[221] *See supra* Part III.B.1 (discussing the relationship between a ''confirmation'' under proposed Rule 15c6–2 and existing Rule 10b–10).

[222] *See generally* Use of Electronic Media for Delivery Purposes, Exchange Act Release No. 36345 (Oct. 6, 1995) (''1995 Release'') (providing Commission views on the use of electronic media to deliver information to investors, with a focus on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the federal securities laws); Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Exchange Act Release No. 37182 (May 9, 1996) (''1996 Release'') (providing Commission views on electronic delivery of required information by broker-dealers, transfer agents and investment advisers); Use of Electronic Media, Exchange Act Release No. 42728 (Apr. 28, 2000) (''2000 Release'') (providing updated interpretive guidance on the use of electronic media to deliver documents on matters such as telephonic and global consent; issuer liability for website content; and legal principles that should be considered in conducting online offerings). Under the guidance, the Commission's framework for electronic delivery consists of the following elements: (1) Notice to the investor that information is available electronically; (2) access to information comparable to that which would have been provided in paper form and that is not so burdensome that the intended recipients cannot effectively access it; and (3) evidence to show delivery (*i.e.,* reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws). *See* 1996 Release at 24646–47.

4. Prospectus Delivery and ''Access Versus Delivery''

Broker-dealers have to comply with prospectus delivery obligations under the Securities Act.[223] As discussed in Part III.A.4, Securities Act Rule 172 implements an ''access equals delivery'' model that permits, with certain exceptions, final prospectus delivery obligations to be satisfied by the filing of a final prospectus with the Commission, rather than delivery of the prospectus to purchasers.[224]

The Commission preliminarily believes that, if a T+1 standard settlement cycle is implemented, such a standard settlement cycle would not raise any significant legal or operational concerns for issuers or broker-dealers to comply with the prospectus delivery obligations under the Securities Act.

The Commission requests comment on whether commenters believe any specific legal or operational concerns would arise for issuers or broker-dealers to comply with the prospectus delivery obligations under the Securities Act if the settlement cycle is shortened to T+1. The Commission asks that commenters identify specific examples of the circumstances in which such legal or operational difficulties could occur.

The Commission also requests comment on the extent to which the T+1 rule proposals may impact compliance with the prospectus delivery requirements under the Securities Act.

5. Changes to SRO Rules and Operations

As with the T+2 transition, the Commission anticipates that the proposed transition to T+1 would again require changes to SRO rules and operations to achieve consistency with a T+1 standard settlement cycle. Certain SRO rules reference existing Rule 15c6–1 or currently define ''regular way'' settlement as occurring on T+2 and, as such, may need to be amended in connection with shortening the standard settlement cycle to T+1. Certain timeframes or deadlines in SRO rules also may refer to the settlement date, either expressly or indirectly. In such cases, the SROs may need to amend these rules in connection with shortening the settlement cycle to T+1.[225]

Because the Commission is also proposing two other rule changes to facilitate a T+1 standard settlement cycle, SRO rules and operations may be affected to a greater extent than occurred during the T+2 transition. For example, while elements of FINRA Rule 11860 could be used to facilitate compliance with proposed Rule 15c6–2, FINRA Rule 11860 currently requires that affirmations be completed no later than the day after trade date and may need to be amended to align with the requirements in proposed Rule 15c6–2.

The Commission solicits comment on the extent to which the T+1 rule proposals may impact existing SRO rules and operations.

F. Proposed Compliance Date

Industry planning and testing was critical to ensuring an orderly transition from a T+3 standard settlement cycle to T+2, and the Commission anticipates that planning and testing would again be critical to ensuring an orderly transition to a T+1 standard settlement cycle, if adopted. Accordingly, the Commission recognizes that the compliance date for the above rule proposals, if adopted, must allow sufficient time for broker-dealers, investment advisers, clearing agencies, and other market participants to plan for, implement, and test changes to their systems, operations, policies, and procedures in a manner that allows for an orderly transition. The Commission also recognizes that the compliance date must provide sufficient time for broker-dealers and other market participants to engage in outreach and education regarding the transition to ensure that, among other things, their customers, including individual retail investors, have time to prepare for operational or other changes related to a T+1 standard settlement cycle.

The Commission is mindful that failure to appropriately implement an orderly transition to T+1, if a T+1 standard settlement cycle is adopted, may heighten certain operational risks for the U.S. securities markets. However, the Commission is also mindful that delaying the transition to a T+1 standard settlement cycle further than is necessary would delay the realization of the risk reducing and other benefits expected under a T+1 standard settlement cycle.[226] The DTCC White Paper contemplated that a transition to T+1 is achievable in the second half of 2023,[227] and the T+1 Report states that a T+1 transition is achievable in the first half of 2024. The T+1 Report estimates that planning for testing will begin in Q4 2022, that industry-wide testing will begin in Q2 2023, and that industry-wide testing will need to occur for one full year before implementation of a T+1 standard settlement cycle.[228] The T+1 Report also states that, once ''regulatory certainty and guidance is achieved, the industry anticipates a lengthy and necessary amount of time will be required for T+1 implementation.''[229]

With these dates and considerations in mind, the Commission believes that market participants should prepare expeditiously for a T+1 transition and proposes a compliance date of March 31, 2024.[230] If the proposed rules and rule amendments presented in this release are adopted as proposed, the Commission believes that the systems and operational changes necessary at the industry level can be planned, tested, and implemented in advance of March 31, 2024. Although the T+1 Report estimates that planning for testing will not begin until Q4 2022, and that industry-wide testing will not begin until Q2 2023,[231] the Commission believes that market participants can implement a T+1 standard settlement cycle by the earlier end of the T+1 Report's overall time table. Specifically, planning for testing could begin sooner than Q4 2022, so that industry-wide testing can begin in early 2023 and conclude in early 2024, in advance of the proposed compliance date.

70. The Commission solicits comment on whether the proposed March 31, 2024 compliance date is appropriate for each of the four proposed rules (Rule 15c6–1, Rule 15c6–2, Rule 17Ad–27,

[223] 15 U.S.C. 77a *et seq.* Section 5(b)(2) of the Securities Act makes it unlawful to deliver (*i.e.,* as part of settlement) a security ''unless accompanied or preceded'' by a prospectus that meets the requirements of Section 10(a) of the Act (known as a ''final prospectus''). 15 U.S.C. 77e(b)(2).

[224] 15 U.S.C. 77e(b)(2); 17 CFR 230.172. Under Securities Act Rule 172(b), an obligation under Section 5(b)(2) of the Securities Act to have a prospectus that satisfies the requirements of Section 10(a) of the Act precede or accompany the delivery of a security in a registered offering is satisfied only if the conditions specified in paragraph (c) of Rule 172 are met. 17 CFR 230.172(b). Pursuant to Rule 172(d), ''access equals delivery'' generally is not available to the offerings of most registered investment companies (*e.g.,* mutual funds), business combination transactions, or offerings registered on Form S–8. 17 CFR 230.172(d). The Commission recently amended Rule 172 to allow registered closed-end funds and business development companies to rely on the rule. *See* Securities Offering Reform for Closed-End Investment Companies, Investment Company Act Release No. 33836 (Apr. 8, 2020), 85 FR 33353 (June 1, 2020).

[225] The T+1 Report similarly indicates that SROs will likely need to update their rules to facilitate a transition to a T+1 standard settlement cycle. T+1 Report, *supra* note 18, at 35–36.

[226] *See infra* Part V.C (discussing the anticipated benefits of a T+1 standard settlement cycle).

[227] DTCC White Paper, *supra* note 61, at 8.

[228] T+1 Report, *supra* note 18, at Fig. 1.

[229] T+1 Report, *supra* note 18, at 6–7.

[230] Notwithstanding the proposed compliance date, market participants could still coordinate to establish an earlier T+1 transition date as needed to ensure effective planning, testing, and implementation.

[231] T+1 Report, *supra* note 18, at Fig. 1.

and the amendment to Rule 204–2(a)). How many months would market participants need to plan, test, and implement a transition to T+1? What data points would market participants use to assess the timing for planning, testing, and implementation? Are any specific operational or technological issues raised by the proposed compliance date? To what extent does the proposed compliance date align or not align with typical practices related to the planning and testing of systems or other technology changes among affected parties, such as market participants, broker-dealers, investment advisers, or clearing agencies? For example, to achieve a compliance date of March 31, 2024, to what extent, if any, would these parties (and market participants more generally) have to consider an implementation date that is earlier than March 31, 2024? Why? Please explain.

71. What is the extent of planning and testing necessary to achieve an orderly transition to a T+1 standard settlement cycle, if adopted? In responding to this request for comment, commenters should provide specific data and any other relevant information necessary to explain the extent of industry-wide planning and testing that would be required to ensure an orderly transition to the proposed T+1 settlement cycle by March 31, 2024.

72. The Commission has proposed a single compliance date applicable to each of the four proposed rules. Would staggering the compliance dates for these rules help facilitate an orderly transition to a T+1 settlement cycle, if adopted? For example, should the compliance date for Rule 15c6–2, if adopted, fall before the compliance date for Rule 15c6–1, to ensure an orderly transition to a T+1 settlement cycle, if adopted? If staggering would be appropriate, what would be an appropriate schedule of compliance dates? Would staggering the compliance dates introduce impediments to an orderly T+1 settlement cycle transition? If so, please describe.

IV. Pathways to T+0

The Commission uses T+0 in this release to refer to settlement that is complete by the end of trade date.[232] This has sometimes been referred to as same-day settlement. In the Commission's preliminary view, same-day settlement could occur pursuant to at least three different models: (i) Netted settlement at the end of the day on T+0; (ii) real-time settlement, where transactions are settled in real time or near real time and presumably on a gross basis (*i.e.,* without any netting applied to reduce the overall number of open positions); and (iii) ''rolling'' settlement, where trades are netted and settled intraday on a recurring basis. In this release, the Commission uses T+0 to refer specifically to netted settlement at the end of the day on T+0. The Commission believes that this model of same-day settlement is currently the most appropriate to consider applying to the standard settlement cycle after implementation of T+1, if adopted, because it retains a core element of the existing settlement infrastructure—namely, the application of multilateral netting at the end of trade date to reduce the overall number of open positions before completing settlement.[233]

The Commission preliminarily believes that implementing a T+0 standard settlement cycle would have similar benefits of market, credit, and liquidity risk reduction that were realized in the shortening of the settlement cycle from T+3 to T+2 and are expected in moving from a T+2 to a T+1 standard settlement cycle. In particular, shortening from a T+2 standard settlement cycle to a T+0 standard might result in a larger reduction in certain settlement risks than would result from shortening to a T+1 standard because the risks associated with counterparty default tend to increase with time.[234] Similarly, because price volatility is a concave function of time,[235] the shorter settlement cycle in a T+0 environment will reduce expected price volatility to a greater extent than in a T+1 environment.[236] In addition, assuming constant trading volume, the volume of unsettled trades for a T+0 settlement cycle could be roughly half that from a T+1 settlement cycle, and, as a result, for any given adverse movement in prices, the financial losses resulting from counterparty default could be half that expected in a T+1 settlement cycle.[237]

The Commission believes that now is the time to begin identifying potential paths to achieving T+0. Thus, the Commission is actively assessing the benefits and costs associated with accelerating the standard settlement cycle to T+0. As the securities industry plans how to implement a T+1 standard settlement cycle, this process should include consideration of the potential paths to achieving T+0 to help ensure that investments in new technology and operations undertaken to achieve T+1 can maximize the value of such investments over the long term. In this way, the transition to a T+1 settlement cycle can be a useful step in identifying potential paths to T+0.

The Commission is also mindful of some perceived challenges to implementing a T+0 standard settlement cycle in the immediate future identified by market participants. As discussed above,[238] the T+1 Report states that T+0 is ''not achievable in the short term given the current state of the settlement ecosystem'' and would require an ''overall modernization'' of modern-day clearance and settlement infrastructure, changes to business models, revisions to industry-wide regulatory frameworks, and the potential implementation of real-time currency movements to facilitate such a change.[239] The T+1 Report identified ''key areas'' that industry groups determined would be impacted by a move to T+0 settlement, including re-engineering of securities processing; securities netting; funding requirements for securities transactions; securities lending practices; prime brokerage practices; global settlement; and primary offerings, derivatives markets and corporate actions.

To advance the discussion of developing and achieving a T+0 standard settlement cycle, the Commission solicits comment on potential approaches to overcoming the operational and other barriers identified by market participants for shortening the standard settlement cycle beyond T+1. Specifically, the Commission in Part IV.A discusses three potential approaches that could be used to implement a T+0 settlement cycle, and solicits comment on all aspects of the approaches described. The Commission also discusses in Part IV.B the operational and other challenges that market participants have identified for implementing T+0, and solicits comment on the building blocks necessary to address or resolve those challenges to enable a T+0 settlement cycle.

[232] *See supra* note 12 and accompanying text.

[233] In Part IV.B, the Commission solicits comment on the merits of this model versus the others described, as well as any other potential settlement models.

[234] *See* T+2 Adopting Release, *supra* note 10, at 15598.

[235] If price changes are uncorrelated across time periods then the variance of price change over T periods is T times the variance over a single period. Therefore, the standard deviation of price changes over T periods is $T^{1/2}$ times the standard deviation over a single period.

[236] *See id.*

[237] *See id.*

[238] *See supra* notes 76–79 and accompanying text.

[239] T+1 Report, *supra* note 18, at 10; *see also supra* notes 76–77 and accompanying text (discussing the same).

A. Possible Approaches to Achieving T+0

To facilitate discussion of T+0 settlement, the Commission has identified three possible approaches or frameworks for considering how to implement T+0 settlement. These are presented not as an exhaustive, complete, or discrete list of pathways but rather as example cases that help illustrate the range of potential approaches, or combination of approaches, that might be useful in facilitating investments that improve the efficiency of the National C&S System, including the ability to implement a T+0 standard settlement cycle. The Commission provides these examples to help facilitate comment on the implications of a T+0 standard settlement cycle and the mechanics of implementation, as well as their potential impact on the challenges identified in Part IV.B. Comments received will help inform any future proposals.

1. Wide-Scale Implementation

One possible path to shortening the settlement cycle from T+1 to T+0 involves a wide effort, led by the Commission or an industry working group, to develop and publish documents like the ISG White Paper, the T+2 Playbook, and now the T+1 Report, in which industry experts identify the full set of potential impediments to T+0, propose solutions, and develop a timeline for education, testing, and implementation.

While this approach would mirror past efforts to shorten the settlement cycle, it necessarily requires industry-wide solutions to the impediments identified with respect to T+0, such as those that may be related to the considerations in Part IV.B. For this reason, the Commission believes that it may be helpful to consider two alternative paths to T+0: (i) An approach where implementation begins first with technology and operational changes by key infrastructure providers; and (ii) an approach where exchanges and clearing agencies offer pilots or similar small-scale programs to establish T+0 as an optional settlement cycle in certain circumstances.

2. Staggered Implementation Beginning With Key Infrastructure

An alternative approach to shortening the settlement cycle from T+1 to T+0 could begin by focusing efforts on improving key settlement infrastructure to support wide-scale implementation of T+0 settlement cycle. Such an approach could involve the development of industry-led or academic research designed to identify the key improvements and to promote engagement with respect to development and implementation.

Under this approach, a key assumption is that achieving a T+0 standard settlement cycle, or the benefits anticipated from it, may not be possible until existing market infrastructure has sufficient capacity to support the full range of market participants who would settle their transactions on T+0, and that the challenges to achieving T+0 derive, in part, from insufficient capacity or capability to serve those market participants. Infrastructure providers have used this approach in the past to develop, test, and implement new technologies and services before wide-scale release. For example, as discussed in Part II.C, following implementation of a T+2 standard settlement cycle, DTCC began to pursue two sets of initiatives, accelerated settlement and settlement optimization, designed to improve its own infrastructure to support more efficient settlement processes. A similar effort following implementation of T+1 could identify improvements to existing infrastructure that could address the challenges identified in Part IV.B. For example, infrastructure providers like DTCC could explore mechanisms that expand the availability of money settlement, as discussed further in Part IV.B.3, or reduce the timing challenges associated with T+0 settlement, as discussed in Part IV.B.8.

3. Tiered Implementation Beginning With Pilot Programs

Exchanges and clearing agencies have often deployed new technologies in targeted environments to test new functionality and service offerings on a small scale. This approach could allow market participants to test T+0 settlement in a targeted environment, such as using a specific exchange or exchanges, specific securities, and/or specific settlement services at a registered clearing agency. SROs could consider pilot proposals that could help advance development of the operational and technological resources necessary to enable T+0 settlement.

For example, DTCC began exploring the use of distributed ledger in 2015, completed its Project ION case study in 2020,[240] and recently announced plans to deploy its ION platform through its ''minimal viable product'' pilot program.[241] According to DTCC, the ION MVP program is a mechanism for NSCC and DTC participants to test the use of distributed ledger technology alongside ''classic'' settlement infrastructure at NSCC and DTC.[242] Similarly, BOX Exchange LLC recently implemented its Boston Security Token Exchange (''BSTX'') platform to enable access to accelerated settlement for certain securities.[243] In India, where the Securities and Exchange Board of India recently announced plans to implement a T+1 settlement cycle, the securities regulator plans to allow local stock exchanges to offer T+1 settlement on certain securities, while retaining a T+2 settlement cycle for others. Each case presents examples where new technologies are offered on a select basis, such as on certain exchanges or for certain securities, in ways that could allow market participants to begin to adapt to T+0 settlement on an incremental basis in a controlled environment.

Such an approach potentially allows market participants to achieve T+0 without having to first address all of the challenges described in Part IV.B for all market participants, instead enabling experimentation and innovation to find solutions for certain segments over time. This could help minimize one challenge noted in the T+1 Report: That T+0 would likely require the adoption of new technologies, implementation costs that would disproportionately fall on small and medium-sized firms that rely on manual processing or legacy systems and may lack the resources to modernize their infrastructure rapidly.[244]

[240] *See* DTCC, Project ION Case Study (May 2020), *https://www.dtcc.com/~/media/Files/Downloads/settlement-asset-services/user-documentation/Project-ION-Paper-2020.pdf.*

[241] *See* Press Release, DTCC, DTCC's Project ION Platform Moves to Development Phase Following Successful Pilot with Industry (Sept. 15, 2021), *https://www.dtcc.com/news/2021/september/15/dtccs-project-ion-platform-moves-to-development-phase-following-successful-pilot-with-industry.*

[242] *See id.* To the extent that elements of the ION MVP program constitute rules, policies, or procedures of NSCC or DTC, it may be subject to the requirements for submitting proposed rule changes under Section 19 of the Exchange Act and Rule 19b–4. *See* 15 U.S.C. 78s(b); 17 CFR 240.19b–4. To the extent that this proposal would involve changes to rules, procedures, and operations that could materially affect the nature or level of risk presented by NSCC or DTC, they may also be required to submit an Advance Notice under the Dodd-Frank Act. *See* 12 U.S.C. 5465(e)(1)(A); 17 CFR 240.19b–4(n).

[243] *See* Exchange Act Release No. 94092 (Jan. 27, 2022), 87 FR 5881 (Feb. 2, 2022) (order approving a proposed rule change to adopt rules governing the listing and trading of equity securities on BOX Exchange LLC through a facility of BOX Exchange LLC to be known as BSTX LLC).

[244] *See* T+1 Report, *supra* note 18, at 10; *see also supra* notes 77–78 and accompanying text (discussing the same); *infra* note 385 and accompanying text (noting that some benefits may accrue to those market participants with high market power).

B. Issues To Consider for Implementing T+0

Below the Commission describes several challenges identified as impediments to implementing a T+0 standard settlement cycle, particularly in the short term. The Commission requests comment on these challenges, as well as any comments identifying other challenges or necessary building blocks associated with implementing T+0. More generally, with respect to each of these topics, the Commission solicits comment on ways to improve the efficiency of and reduce the risks that can result from the post-trade processes implicated by each of these challenges. The Commission is particularly interested in commenters that identify potential methods or building blocks that can enable T+0. In considering the below topics, the Commission also requests that commenters assess whether the three approaches identified in Part IV.A might affect the analysis of the below or otherwise reveal potential methods for addressing and implementing them.

1. Maintaining Multilateral Netting at the End of Trade Date

As discussed in Part II.B.1, multilateral netting by the CCP is an essential feature of the National C&S System. By substantially reducing the volume and value of transactions in equity securities that need to be settled each day, CCP netting unlocks substantial capital efficiencies for market participants while, at the same time, reducing credit, market, and liquidity risk in the National C&S System. While the Commission continues to consider how new technologies and business practices in the industry might further reduce risk and promote capital efficiency, the Commission preliminarily believes that the capital efficiencies and risk reduction benefits that result from the use of multilateral netting make it unlikely that market participants could cost-effectively implement a T+0 standard settlement cycle without the continued use of multilateral netting in some form.[245]

In particular, at this time the Commission believes that a transition from T+1 settlement to real-time settlement could not be achieved without substantial and significant changes to fundamental elements of market structure and infrastructure because real-time settlement, to the extent it requires gross settlement would prevent the use of, or significantly reduce the utility of, multilateral netting before settlement. If market participants develop technologies and business practices that can support the use of a real-time settlement system in the U.S. at some point in the future, the Commission is interested in understanding how such technologies might interact with existing infrastructure that provides multilateral netting. Indeed, retaining multilateral netting in a T+0 environment poses challenges that include accommodating the submission of trades for clearing during and after the close of regular trading hours while still producing netting results with sufficient time to enable market participants to position their cash and securities to achieve final settlement before money settlement systems close for the day.[246] The Commission observes that existing processes and computational tools used to complete the processing and settlement of trades currently rely on significantly more time than the few hours between the close of regular trading hours and the close of money settlement systems on a given day.

The Commission is interested in receiving public comments on both the utility of centralized multilateral netting as a feature of the National C&S System and any potential impediments or challenges associated with retaining such netting functionality while shortening the settlement cycle to T+0. The Commission is also interested in receiving public comments on potential benefits or costs associated with real-time settlement. In particular the Commission requests comment on the following:

73. Is it possible to shorten the settlement cycle in the U.S. markets to T+0 and retain multilateral netting? If so, what is the earliest time on T+0 that market participants could be prepared to settle their trades without eliminating multilateral netting, and what changes, if any, to existing netting processes would be necessary to move to a T+0 settlement cycle?

74. Could a real-time settlement model be successfully deployed in the National C&S System in a way that compliments the use of multilateral netting? If yes, please explain. For example, most institutional trades that use bank custodians generally are not submitted to CNS for netting. Would it be possible to settle those trades in a real-time settlement model while other trading activity would continue to rely on multilateral netting? Alternatively, would it be beneficial to find ways to move more institutional trades into multilateral netting processes, such as by expanding access to multilateral netting systems to custodians? Why or why not? What are the impediments to expanding access to custodians?

75. If real-time settlement is not possible without eliminating or substantially curtailing multilateral netting activity, please explain.

76. If real-time settlement is not compatible with multilateral netting, would the potential benefits of real-time gross settlement still justify the elimination of multilateral netting in the National C&S System? Please explain why or why not.

77. What impact would the elimination of multilateral netting have on capital demands (*e.g.,* margin requirements) imposed on market participants in connection with their settlement obligations? To the extent possible, please include any quantitative estimates or data that may be relevant to the request for comment.

78. How would the elimination of multilateral netting impact overall levels of market, liquidity and credit risk in the clearance and settlement system and how might such risks be distributed among market participants?

79. Are there disadvantages to multilateral netting and, if so, what are they? Does multilateral netting mandate the use of agreed timeframes to determine which trades will be included in netting (for example, trades settling on or executed on a given day or within a given hour)? Why or why not? Are there netting activities that currently only happen once a day that might need to occur more often for trades to settle at the end of trade date? If so, what are they and are there benefits, costs or risks to performing these activities more than once a day?

80. Does multilateral netting foster or require the use of batch processing? Does multilateral netting necessitate sequential processing activities that impede the adoption of same-day settlement? Why or why not? For example, do introducing broker-dealers that maintain omnibus accounts at clearing broker-dealers need to net their activity prior to submitting net trades to their clearing broker-dealers who, in turn, have a dependency before being able to calculate their own net figures? Are there computational or other technology upgrades that could be employed to accelerate these processes so that they could continue to function effectively under the shortened timeframes available in a T+0 environment? Are there other settlement

[245] *See infra* Part V.B.1 (discussing the capital efficiencies and risk reducing effects that result from the use of multilateral netting).

[246] Part IV.B.3 discusses existing limitations in money settlement infrastructure that may contribute to this challenge.

models, such as those deploying intraday or rolling settlement, that could improve the settlement process in such a way that facilitates an effective multilateral netting process at the end of the day in a T+0 environment?

2. Achieving Same-Day Settlement Processing

Moving settlement to the end of trade date would significantly compress the array of operational activities and processes required to achieve settlement, raising questions about whether the current arrangement of settlement processes can support T+0 settlement.

For example, in the current T+2 settlement environment, DTC processes certain transactions for settlement during the day on settlement date and other transactions the night before settlement date (''S–1'') during the so-called ''night cycle,'' which begins at 8:30 p.m. on S–1. Processing transactions during the night cycle allows for earlier settlement of certain transactions that are included in the night cycle, thereby reducing counterparty risk and, with respect to transactions that are cleared through NSCC, enables such transactions to be removed from members' marginable portfolios, which in turn reduces such members' NSCC margin requirements.

DTC uses a process called the ''Night Batch Process'' to control the order of processing of transactions in the night cycle.[247] During the Night Batch Process, DTC evaluates each participant's available positions, transaction priority and risk management controls, and identifies the transaction processing order that optimizes the number of transactions processed for settlement. The Night Batch Process allows DTC to run multiple processing scenarios until it identifies an optimal processing scenario. At approximately 8:30 p.m. on S–1, DTC subjects all transactions eligible for processing to the Night Batch Process, which is run in an ''off-line'' batch that is not visible to participants, allowing DTC to run multiple processing scenarios until the optimal processing scenario is identified. The results of the Night Batch Process are incorporated back into DTC's core processing environment on a transaction-by-transaction basis.

Because trade date and settlement date would be the same day in a T+0 environment, shortening the standard settlement cycle to T+0 would require DTC and its participants to initiate and complete their settlement processes much sooner relative to the time a trade is executed and without the benefit of any overnight processes. Compressing timeframes to achieve T+0 settlement necessarily removes the ability to perform any settlement activities on S–1. This has implications for how DTC conducts its existing ''night cycle'' process but, more broadly, for all the market participants who collect trading information that feeds into the night cycle process and any systems that they run overnight to prepare for settlement. Moving to a T+0 settlement cycle would also impact the processing timeframes for corporate actions.

The Commission requests public comment regarding the prospective impact that shortening the settlement cycle to T+0 would have on settlement processes such as those described above. In particular, the Commission requests comment on the following:

81. Would shortening the standard settlement cycle to T+0 allow sufficient time for settlement processes that are currently conducted by DTC and its participants to be completed on a timeframe that is compatible with timely settlement? If not, why not?

82. When would be the optimal time to complete existing processes that occur on S–1 in a T+0 environment? More generally, how would existing settlement processes that occur on S–1 need to change to accommodate a T+0 standard settlement cycle?

83. What would be the impact on market participants (clearing agencies, broker-dealers, buy side participants, retail investors, etc.) of any changes in processes necessary to accommodate T+0?

84. What risks, if any, arise by the compression of the settlement cycle to accommodate T+0, particularly as it relates to market, credit, liquidity, and systemic risk? What are the associated costs of these risks? How might these risks affect the market, trading behaviors, investors (both retail and institutional), and innovation? Is mitigation of these risks feasible, and if so, how?

3. Enhancing Money Settlement

To achieve final settlement on settlement date, DTCC and its clearing agency participants rely on access to two systems operated by the Federal Reserve Board, the National Settlement Service and Fedwire.[248] These systems settle the cash portions of securities transactions. Final settlement at NSS and Fedwire currently must occur by 6:30 p.m., leaving little time in a T+0 environment for market participants to settle their positions in an end-of-day process after most major U.S. stock exchanges typically close at 4:00 p.m. Although Fedwire (but not NSS) reopens at 9:00 p.m., payments posted are processed overnight and, like NSCC/DTC securities movements processed during the night cycle, do not settle until the following day. NSS is available throughout the trading day, although currently DTCC only makes use of it at defined points during the day.

85. To achieve T+0, would NSS and FedWire services need to have their availability expanded? If so, how? What timeframes (both minimum and desired standards) would be necessary to accommodate T+0?

86. What other changes to NSS or FedWire, if any, would be necessary to accommodate a T+0 settlement environment? If the available windows for NSS or FedWire were to change, what changes would market participants need to make to their own systems and processes to accommodate such changes?

87. Are there ways to manage the money settlement process in a T+0 environment that do not require changes to NSS or FedWire? Please explain.

4. Mutual Fund and ETF Processing

Purchases and redemptions of shares of open-end mutual funds generally settle today on a T+1 basis, except for certain retail funds and ETFs sold through intermediaries,[249] which typically settle on T+2. For open-end funds, several mutual fund families offer investors the ability to open an account directly with the fund's transfer agent and trade through that account. In other cases, orders are placed with intermediaries, such as broker-dealers, banks and retirement plan recordkeepers. Much of this intermediary activity is processed through DTCC's Fund/SERV system, in which intermediaries submit orders through Fund/SERV that are then routed to mutual fund transfer agents to be executed at the current net asset value (''NAV'')[250] next calculated by the fund's administrator after receipt of the order, pursuant to Rule 22c–1 of the Investment Company Act.[251] These

[247] *See* DTC, Settlement Service Guide, at 68 (June 24, 2021), *https://www.dtcc.com/-/media/Files/Downloads/legal/service-guides/Settlement.pdf.*

[248] *See id.* at 18–19.

[249] ETFs are investment companies registered under the Investment Company Act. *See* 15 U.S.C. 80a–3(a)(1). Historically, ETFs have been organized as open-end funds or UITs.

[250] *See* 17 CFR 270.2a–4 (defining ''current net asset value'').

[251] Open-end funds are required by law to redeem their securities on demand from shareholders at a price approximating their proportionate share of the

orders may be submitted on an omnibus basis and in one of three ways: As a request to purchase or redeem a given number of shares or units, as a request to purchase or redeem a given U.S. dollar value, or as a request to exchange a given number of shares/units or U.S. dollar value for another fund. Because the NAV becomes the 'price' for each order, the net money to be paid or received at settlement cannot be calculated until after the NAV has been calculated and published. Once the NAV is available, the transfer agent is able to issue confirmations to the intermediaries acknowledging receipt and execution of the orders submitted. For orders submitted as share quantities, the net confirmation includes not only the quantity executed, but the net amount of money to be exchanged at settlement. For orders submitted as U.S. dollar amounts, the transfer agent can calculate the quantity purchased or redeemed and include it in the confirm. For exchanges of shares in one fund for shares in another, the NAV of both funds is required to determine both the quantity and the net settlement amount for each fund.

In general, mutual fund families will utilize prices as of 4:00 p.m. ET to value the underlying holdings in each fund for the current day.[252] This is a critical input to the calculation of the NAV and, as such, 4:00 p.m. ET is a dependency in the NAV calculation process. Prior to 4:00 p.m. ET, fund administrators are able to reconcile holdings to custodians, calculate and apply any income and expense accruals, update the shares outstanding based on the prior day's purchase and redemption activity and in general prepare for the receipt of current-day prices. Once those prices are available, fund administrators are able to apply prices to holdings, perform a variety of validation checks on the prices and fund and ultimately calculate or ''strike'' the NAV, then submitting or publishing the NAV to pricing vendors, newspapers and intermediaries. This tends to occur between 6:00 p.m. ET and 8:00 p.m. ET.

Once the day's NAV of a fund is available and each intermediary calculates the settlement quantity or monetary amount for each order,[253] the intermediary aggregates and nets the amount of money to be paid to or received from each fund's agent bank. These values are aggregated and netted to determine a single payment or receipt per bank and instructions are sent to the intermediary's bank to arrange for payments.

In the event an intermediary is an introducing broker, these introducing broker calculations are then forwarded to the clearing broker, which, in turn, aggregates values received from other introducing brokers as well as any of its own order activity. Ultimately the clearing broker determines a single net payment or receipt for each agent bank representing all of the funds traded. The clearing broker must receive calculations for all its introducing brokers before it can finalize its own calculations.

Given the current timing of NAV calculation and publication, we understand that many market participants are not able to calculate net settlement amount or quantity traded until after 8:00 p.m. ET. This is 90 minutes later—to the extent this activity occurs on 8:00 p.m. ET—than the time the Federal Reserve's NSS system, which moves the cash necessary to effect settlement of securities transactions, closes at 6:30 p.m.[254] Even when a NAV is available at 6:00 p.m. ET, there is only a 30-minute window for intermediaries to obtain the NAV, calculate settlement quantity or net amount, determine the net cash to be paid or received for each fund, further determine the net payment or receipt for each agent bank across all funds traded and to submit these values to NSS prior to its close at 6:30 p.m. ET. In addition, if the intermediary services other intermediaries at another omnibus ''tier,'' such as a clearing broker servicing one or more introducing brokers, the intermediary must wait on calculations from others before finalizing its own numbers and submitting instructions. This sequential processing introduces a greater number of activities that must occur in the approximately 30-minute window that would typically be available for same-day settlement.

As noted earlier, to receive a given day's NAV, intermediaries must receive orders prior to the time at which the fund's NAV is calculated, but intermediaries may not submit these orders to Fund/SERV or the transfer agent until after the NAV calculation time, in some cases as late as around 7:30 a.m. ET on T+1.[255] The Commission understands this is often the case with retirement plan recordkeepers who perform compliance and other checks on orders before they are finalized for submission to Fund/SERV. Such timing would require modification to support end of day settlement on T+0.

Unlike mutual funds, ETFs do not sell or redeem individual shares. Instead, APs that have contractual arrangements with the ETF purchase and redeem ETF shares directly from the ETF in blocks called ''creation units.'' An AP that purchases a creation unit of ETF shares directly from the ETF deposits with the ETF a ''basket'' of securities and other assets identified by the ETF that day, and then receives the creation unit of ETF shares in return for those assets. After purchasing a creation unit, the AP may hold the individual ETF shares, or sell some or all of them in secondary market transactions. The redemption process is the reverse of the purchase process: The AP redeems a creation unit of ETF shares for a basket of securities and other assets. Secondary market trading of ETF shares occurs at market-determined prices (*i.e.,* at prices other than those described in the prospectus or based on NAV), and the settlement values will be known at the time of execution, similar to an exchange-traded equity security.[256] Secondary market ETF share transactions settle today on a T+2 basis. Currently, most securities in a ''creation basket'' settle in a similar timeframe (T+2) as the settlement time for a ''creation unit,'' which is also the same as the settlement time for the ETF shares sold to APs, as well as ETF shares traded in the secondary market.

NAVs are calculated for ETF shares in a manner similar to the process for open-end mutual funds, with comparable times for capturing prices of underlying holdings and for publishing the NAVs. Secondary market purchases and sales of ETF shares occur throughout the business day and often occur at prices that differ from the ETF's

fund's NAV at the time of redemption. *See* 15 U.S.C. 80a–22(d).

[252] As noted in Part IV.B.3, most major U.S. stock exchanges typically close at 4:00 p.m. ET during standard (*i.e.,* non-holiday) trading hours.

[253] For example, if an order were placed as shares, the intermediary would multiply the share quantity and the NAV to determine the amount of money to be paid or received. If an order were placed as a dollar amount, the intermediary would divide this amount by the NAV to calculate the share quantity traded. (These calculations may be further adjusted for commissions or other fees.) Exchange transactions would require two calculations: One for the redemption side of any exchange, and then a second calculation for the subscription side of the exchange.

[254] *See supra* note 248 and accompanying text.

[255] Per a 2017 ICI survey based on 3Q 2016 data, only 70% of trade flow, including estimated trade flow, is known by funds or their transfer agents around 5:00 p.m. ET and that number remains rather constant until approximately 7:00 a.m. ET on T+1. *See* ICI, Evaluating Swing Pricing: Operational Considerations, at 4 (June 2017), *https://www.ici.org/system/files/attachments/pdf/ppr_17_swing_pricing_summary.pdf.*

[256] Purchases and sales of ETFs in the secondary market may offset one another and do not always result in a primary market transaction between the AP and the ETF to create or redeem units.

NAV.[257] Those trading ETF shares in the secondary market during the day will know their settlement amount almost immediately, because the transaction price is the market price of the shares. Therefore, secondary market ETF share transactions generally do not present the same challenges presented by open-end mutual funds when considering same-day settlement.[258]

The Commission requests comment on the challenges open-end mutual funds and ETFs might experience if U.S. markets were to adopt T+0 settlement.

88. Are there additional factors that may negatively affect same-day settlement of open-end mutual funds and ETFs that we have not described, and if so, what are they? Please provide as much detail as possible.

89. Are fund administrators able to calculate and release NAVs any earlier while still relying on 4:00 p.m. ET prices? What can they do to optimize their processes, including the publication of the NAV?

90. Is our description of the netting across multiple omnibus ''tiers''—and the subsequent sequential processing that results—an accurate portrayal? If so, how many tiers might exist that would necessitate sequential processes and how long might each tier be expected to need to perform its calculations to pass on to the next tier? What factors influence this processing? Are there potential solutions to this sequential processing challenge and, if so, what are they? Are there ways in which intermediaries might process information concurrently? If this description of netting across multiple omnibus tiers does not capture current processes, please provide an explanation of the way(s) it does occur today.

91. Could open-end mutual funds and ETFs settle on a T+1 basis even if other security types, such as equities and corporate bonds, move to T+0 settlement? If so, what risks would be introduced to open-end mutual funds and ETFs from holding positions in securities that settle on a T+0 basis when trades of the fund's shares occur on a T+1 basis? Should these funds receive large amounts of purchases from investors, would they wait a day for those purchase transactions to settle before investing cash in securities? Would they rely on borrowing facilities and, if so, does that introduce new issues or risks? For large redemption requests by investors, would these funds have additional time to liquidate underlying holdings or would they increase their cash position in the interim?

92. Are there additional considerations for APs if securities in a creation basket settle on a different basis than the shares of the ETF? What are the current risks and considerations in this process where the securities in a creation basket settle on a different basis than the shares of the ETF itself, such as is the case with U.S. Treasury securities, which commonly settle on a T+1 basis today while the ETF shares settle on a T+2 basis?

93. What time do market intermediaries believe would be necessary for open-end mutual funds and ETFs to publish NAVs in order to achieve same-day settlement and why?

94. What are the reasons intermediaries do not submit orders to purchase or sell mutual fund shares to Fund/SERV or the transfer agent earlier on trade date? What are the reasons some intermediaries may be delayed in the submission of those orders until T+1 in the current environment? Please be as specific as possible and include data if available on submission times. What would be needed to accelerate these timeframes?

95. Would open-end mutual funds potentially establish an earlier cut-off time for placing orders to purchase or sell fund shares than is currently used (*i.e.,* earlier than 4:00 p.m. ET) to capture prices for NAV calculations, in order to speed the time at which a NAV can be published? If so, what time might be most likely and why? If different funds opted to use different times, would this create new market opportunities for funds? What challenges would this introduce?

96. The Commission understands that some ETFs calculate NAVs more than once per day. Are there unique challenges and opportunities these funds may have with same-day settlement?

97. Currently, Rule 22c–1(a) of the Investment Company Act limits the ability to transact in fund shares at a price other than ''a price based on the current net asset value . . . which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.'' In the event a fund elects to calculate its NAV using intra-day prices for the underlying securities held in the fund, such as utilizing 2:00 p.m. ET prices to value its portfolio in order to produce a NAV earlier in the day to support same-day settlement, how would this limitation impact the acceptance of orders to purchase or redeem shares of the fund? Would a fund establish a cut-off time for acceptance of orders that is based on the time when a snapshot of prices is captured to value the fund's securities positions? Would it be possible in different scenarios for investors to have an information advantage and, if so, how? For funds that may currently utilize prices for U.S. securities prior to the U.S. market close, how has such an approach modified timelines and processes for acceptance of orders and publication of the NAV?

98. If different funds adopt differing policies for the time to capture prices or to publish NAVs, and subsequently impose different cut-off times for receipt of orders pursuant to Rule 22c–1, would intermediaries be able to accommodate such differences on a fund-specific basis?

99. Might funds consider requiring orders to be received by the fund's transfer agent, rather than an intermediary, by the cut-off time? Are there other ways in which a movement to T+0 settlement would affect transfer agents' processes, and if so, how should those processes be changed?

100. If receipt by an intermediary is sufficient (as opposed to requiring orders be received by the fund's transfer agent by the cut-off time), as is the case today, how do intermediaries or others monitor intermediary compliance?

101. Does monitoring of order receipt relative to cut-off times differ by types of intermediaries? For example, are there different processes to monitor ''authorized agents'' as opposed to other types of intermediaries? What are the differences between ''authorized agents'' and other intermediaries?

102. If ETFs were to utilize an earlier time in the day to capture prices of their portfolio investments for purpose of calculating the ETF's shares' NAV (that is, the price that would form the basis for APs' purchases and redemptions of creation units), how would this affect

[257] The combination of the creation and redemption process with secondary market trading in ETF shares and underlying securities provides arbitrage opportunities that are designed to help keep the market price of ETF shares at or close to the NAV per share of the ETF. *See* Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019), 84 FR 57162, 57165 n.31 (Oct. 24, 2019).

[258] We understand that some institutional investors may opt to place orders to trade ETFs at the end-of-day NAV. These are generally placed with a market maker who may or may not be an AP. The market maker will guarantee the end-of-day NAV price plus (or less) a fee (depending on the direction of the trade) to cover transaction costs and profit. The market makers can either trade with the institutional investor as a proprietary or principal trade or they can submit a creation/redemption as agent on behalf of the institutional investor and deliver/receive cash or the basket in exchange for the ETF shares. Under these circumstances, secondary market investors in ETF shares would incur the same time compression described above for open-end mutual funds to settle on a T+0 basis.

primary market transactions in ETF shares? Would this affect secondary market ETF share transactions in any way, for example, transactions by institutional investors who may opt to place orders to trade ETFs at the end-of-day NAV?

103. Should the Commission consider elimination of omnibus processing to facilitate the adoption of T+0 settlement for open-end mutual funds? Since any investor account must be maintained by at least one party, how does omnibus accounting by intermediaries rather than maintaining investor-specific accounts at each fund's transfer agent reduce costs to investors?

104. Are there any additional unique considerations for open-end mutual funds or ETFs that hold non-U.S. securities if the Commission were to adopt a same-day settlement standard while non-U.S. markets may continue with longer settlement timeframes, including T+1 and T+2? What potential liquidity impacts might such funds experience?

5. Institutional Trade Processing

As discussed throughout this release, while significant improvements to the infrastructure for institutional trade processing have decreased reliance on manual activities and enabled more transparency into and standardization of trade information, several operational and technology challenges continue to limit the speed, accuracy, and efficiency of institutional trade processing, all of which would be more acute in a T+0 environment.

As discussed previously, the T+1 Report recommends that allocations for all institutional trades be made and communicated by 7:00 p.m. on trade date and these trades be confirmed and affirmed by 9:00 p.m. ET on trade date.[259] The industry has identified a number of issues related to the institutional trade process that would need to be addressed in a T+1 settlement cycle, including, but not limited to, trade systems and reference data, the trade allocations, confirmation and affirmation cut-off times, batch cycle timing, migration to trade date matching, and identification of automated vendor solutions to alleviate manual processing.[260] In addition, improvements in the quality and standardization of settlement instructions, the quality of static settlement data maintenance, the use of automation and the expansion of straight-through processing capabilities would all help facilitate higher affirmation rates and faster processing.

As discussed in Part III.D, the Commission has previously explained that a shortened settlement cycle may lead to increased reliance on the use of CMSPs, with a focus on improving and accelerating the allocation, confirmation, and affirmation processes and enhancing efficiencies in the services and operations of the CMSPs.[261] Improved automation in the settlement process has enabled better straight-through processing and contributed to increases in affirmation rates on trade date and increases in settlement rates, with an attendant decrease in exceptions and fails. Moving to T+1 may promote continued improvements in technology and operations, encourage incremental increases in the utilization by certain market participants of CMSPs, and focus the industry on improving and accelerating the allocation, confirmation and affirmation processes by completing those processes earlier and more efficiently.

However, it is unclear whether addressing these issues would (i) facilitate further shortening of the settlement cycle beyond T+1; (ii) whether these issues would continue to be relevant in a T+0 environment; or (iii) whether new technologies or operational processes would need to be designed and implemented to accommodate T+0 for institutional trade processing. Accordingly, the Commission is requesting comment on all issues pertaining to improving the institutional trade processing in order to achieve a T+0 standard settlement cycle. In addition, the Commission is seeking comment on the following:

105. What operational, technological and regulatory issues related to institutional trade processing should be considered in further shortening of the settlement cycle to T+0, particularly any impediments to investors and other market participants?

106. What, if anything, should the Commission do to facilitate T+0, particularly as it relates to the standardization of reference data, the use of standardized industry protocols by broker-dealers, asset managers, and custodians, and the use of matching services?

107. Does moving to T+0 introduce any new risks in the processing of institutional trades? If so, please describe such risks and whether mitigation is possible. Can such risks be quantified?

108. What are the benefits and costs of settling institutional trades in a T+0 environment? What are the relative challenges for the different market participants involved? Do the benefits of T+0 accrue to all participants—brokers, institutional customers, custodians, or matching utilities? Do they accrue to large, medium, and small entities?

109. How would the current systems and processes used in the institutional post-trade process need to change to accommodate a T+0 settlement requirement?

110. Would any or all of the changes contemplated by the Industry Working Group to address the building blocks considered essential for institutional trade settlement in T+1 be useful should the settlement cycle move to T+0?

111. How would the allocation, confirmation and affirmation process be accomplished in a T+0 environment? In particular, what timeframes would be necessary to ensure settlement on T+0? To what extent would the roles of CMSPs, broker-dealers, or bank custodians need to change to accommodate T+0 settlement? To what extent does the use of a custodian foster or impair a transition to a T+0 settlement cycle? Please explain.

112. What effect would T+0 have on the relationship between a broker-dealer and its customer? What effect would T+0 have on the relationship between an investor and its custodian?

6. Securities Lending

Both the ISG White Paper and the T+2 Playbook highlighted the potential impact shortening the settlement to T+2 may have on securities lending practices in the U.S. For example, the ISG White Paper noted that securities lenders may have less time to recall loaned securities, and securities borrowers should be cognizant of the reduced timeframe between execution and settlement when loaning securities, particularly when transacting in hard to borrow securities.[262] The ISC White Paper further stated that service providers may need to update their

[259] T+1 Report, *supra* note 18, at 13; *see also supra* note 164 and accompanying text (discussing the same). Additionally, the industry has recommended the adoption of Commission or SRO rules requiring: (i) Broker-dealers to obtain an agreement from their customers at the outset of the relationship or at the time of the trade to participate in and to comply with the operational requirements of interoperable trade-match systems as a condition to settling trades on an RVP/DVP basis; and (ii) investment managers to participate in a trade-match system, similar to the way broker-dealers and institutions are required by the SRO confirmation/affirmation rules to participate in a confirmation/affirmation system.

[260] *See supra* note 259.

[261] *See* T+2 Proposing Release, *supra* note 30, at 69258.

[262] ISG White Paper, *supra* note 26, at 26.

products and services to accurately process such transactions.[263]

The T+2 Playbook included several recommendations regarding actions firms should take to address the potential impact that shortening the standard settlement cycle may have on securities lending practices in the industry. For example, the T+2 Playbook recommended that market participants' decisions to loan securities should take into account the shortened settlement cycle, and stock borrow positions should be evaluated to reduce exposure to counterparty risk based on the shortened settlement cycle.[264] More recently industry working groups tasked with understanding industry requirements for shortening the standard settlement cycle to T+1 have begun to analyze how shortening the settlement cycle may require additional changes to securities lending practices.[265]

While market participants have yet to explore in significant detail how shortening the settlement cycle to T+0 might impact securities lending practices in the U.S. markets, the Commission preliminarily believes that such a move would likely impact these practices further, and may necessitate further changes to procedures, operations and technologies that facilitate securities lending and borrowing. Additionally, the Commission is interested in learning whether shortening the standard settlement cycle to T+0 could impact overall liquidity in the U.S. markets to the extent that market participants may curtail their participation in the securities lending markets in response to such a move.

The Commission is requesting public comment regarding all aspects of the potential impact that shortening the settlement cycle to T+0 could have on securities lending in the U.S. In particular, the Commission requests comment on the following:

113. To what extent would shortening the standard settlement cycle to T+0 make it difficult for securities lenders to timely recall securities on loan?

114. To what extent would the Commission need to amend Regulation SHO to accommodate securities lending in a T+0 environment? Are there changes to Regulation SHO that can be made to help facilitate lending in a T+0 environment?

115. Please describe any technology changes that might be necessary to support securities lending operations of market participants if the settlement cycle were shortened to T+0. Please include in any comments descriptions of existing technologies that may help the Commission identify and understand the limitations, if any, of such technologies with respect to a T+0 settlement cycle.

116. With respect to stock loan recalls, are there ways to improve the level of coordination between investment managers and third-party lending agents for underlying funds, and to facilitate partial stock loan recalls from bulk lending positions aggregated from multiple institutional investors? [266]

117. To what extent might securities lenders need to rely on predictive analytics to make decisions regarding which securities to recall before lenders can be sure such recalls will be necessary? What additional costs, if any, might be associated with the increased use of predictive analytics?

118. How might shortening the standard settlement cycle to T+0 impact market participants seeking to borrow securities in the U.S. markets? Please include discussion regarding the possible impact on market participants' ability to borrow securities that might be difficult to borrow.

119. How might shortening the standard settlement cycle to T+0 impact the decisions of securities lenders and borrows to lend and borrow securities, respectively?

120. What impact, if any, would shortening the standard settlement cycle to T+0 have on the cost of borrowing securities in the U.S.?

121. What impact would shortening the settlement cycle to T+0 have on costs related to loaning securities (*e.g.,* investments in technology improvements, analytics, etc.)?

122. To what extent might shortening the standard settlement cycle to T+0 reduce revenue securities lenders generate from loaning securities compared with a T+2 or T+1 settlement cycle?

123. What impact, if any, might a T+0 settlement cycle have on overall liquidity in the U.S. markets if such a move were to reduce securities lending activity?

124. Please describe any indirect impact that shortening the standard settlement cycle to T+0 might have on market structure or trading activity as a result of changes to securities lending in the U.S. markets. For example, if shortening the settlement cycle to T+0 would reduce the availability of difficult to borrow securities, how would such a reduction impact short selling practices in the U.S. markets?

125. Please describe any other impacts that shortening the settlement cycle to T+0 might have on securities lending markets in the U.S.

7. Access to Funds and/or Prefunding of Transactions

A T+0 settlement cycle may increase prefunding requirements for investors, shifting some costs from broker-dealers and banks to retail and institutional investors.[267] When purchasing securities in the U.S. market, retail and institutional investors must be ready to provide cash to settle their securities transaction. Cash is typically held in a short-term sweep account, such as a money market fund (MMF) or commingled vehicle, and therefore requires that the investor redeem cash from the sweep vehicle to finance the securities transaction. Alternatively, it may simply be held in a cash account. In some cases, funds will be converted to USD from another currency through an FX transaction. The specific needs, timing and arrangements vary for retail versus institutional investors. Retail investors may fund their securities transactions using cash accounts, and in such cases FINRA rules permit the brokers to require the payment of purchase money to be paid ''upon delivery,'' [268] which functionally means no later than settlement. Some brokers require their retail clients to prefund their transactions—in other words, deposit sufficient cash for settlement in their brokerage account before the broker acts on their orders and executes a purchase trade. Alternatively, retail clients may be permitted to fund transactions through use of a margin account. An institutional investor is required, pursuant to its contractual relationships with its brokers and custodians, to provide cash (or have credit available) on the day that the custodian or broker receives the purchased securities and credits them to the investor's account.

In a T+0 environment, investors will not have time after markets close to identify and obtain the cash necessary for settlement of a securities transaction, as settlement of the securities transaction will occur on the same day. This could have a number of potential effects, and the Commission is requesting comment on the following:

[263] *Id.*

[264] T+2 Playbook, *supra* note 27, at 86.

[265] T+1 Report, *supra* note 18, at 24–25.

[266] *See, e.g.,* ISITC Virtual Winter Forum, Securities Lending Working Group discussion (Dec. 13, 2021).

[267] This discussion concerns the settlement arrangements between investors and their brokers or custodians. These arrangements are separate from obligations of brokers and custodians to NSCC and DTC.

[268] *See* FINRA Rule 11330.

126. Will there be a significant increase in prefunding requirements for securities transactions across market participants? Would some investors have to start planning in advance before the trade date to accurately position necessary funds for redemption and securities and cash for settlement? To what extent might retail investors alter their funding behaviors or their use of margin accounts in response to added prefunding requirements?

127. Would a prefunding requirement shift risk from the broker-dealer and bank community to the investor, both retail and institutional?

128. To the extent that an investor would need to redeem shares of a money market fund to receive cash to settle a separate securities transaction, how would such redemptions be effected? Would redemptions of money market fund shares need to be effected in the morning of T+0 to receive cash to settle a separate securities transaction on the same day?

129. How would this affect the borrowing of cash from clearing members, prime brokers, custodians, and other liquidity providers when an institutional investor cannot successfully redeem funds or otherwise convert assets to cash in time to settle?

130. How would T+0 affect FX transactions used to finance the settlement of transactions?

131. Could T+0 affect the volume of securities trading at various points throughout the trading day?

8. Potential Mismatches of Settlement Cycles

The Commission preliminarily believes that shortening the standard settlement cycle to T+0 could create mismatches between settlement timeframes in different markets, or could increase the degree to which certain settlement timeframes may already be mismatched at the time a T+0 settlement cycle might be implemented. For example, most major securities markets in non-U.S. jurisdictions currently settle transactions on a T+2 basis, as do FX markets generally. When the Commission amended Exchange Act Rule 15c6–1(a) in 2017 to shorten the standard settlement cycle to T+2, several major securities markets had already adopted a T+2 settlement cycle, and the move to T+2 in the U.S. harmonized large portions of the U.S. settlement cycle with prevailing settlement cycles in those markets.[269]

In the T+2 Adopting Release the Commission stated that the prospective harmonization of the standard settlement cycle in the U.S. with settlement cycles in foreign markets that settle transactions on a T+2 settlement cycle may reduce the need for some market participants engaging in cross-border and cross-asset transactions to hedge risks stemming from mismatched settlement cycles and reduce related financing and borrowing costs, resulting in additional benefits.[270] The T+2 Adopting Release also noted that shortening the settlement cycle further than T+2 at that time could increase funding costs for market participants who rely on the settlement of FX transactions to fund securities transactions that settle regular way.[271]

Whether shortening the standard settlement cycle for securities transactions in the U.S. to T+0 would in fact result in mismatched settlement cycles vis-à-vis major foreign securities markets, or the settlement cycle for FX transactions, may depend on future developments that are unknown at this time, including the extent to which settlement cycles in those markets might be shortening in response to the implementation of a shorter settlement cycle for securities in the U.S., or in response to other future developments in global markets.

The Commission notes that mutual funds and investment advisers have invested in markets with mismatched settlement cycles for many years.[272] Many investors evaluate an investment portfolio based on traded positions without reference to pending or actual settlement because entitlement to trade, receive income or corporate actions and performance calculations generally are based on trade-date information. Nonetheless, institutional and retail investors alike often consider anticipated settlement dates when managing cash balances to ensure that settlements do not conflict or create an unexpected shortfall of cash, or an unplanned event that results in an uninvested cash balance.

The Commission is interested in receiving public comment regarding the impact a T+0 standard settlement cycle in the U.S. securities markets might have on global harmonization of settlement cycles, including any indirect impact on market participants. Specifically the Commission requests comment on the following:

132. Would shortening the standard settlement cycle to T+0 in the U.S. securities markets result in decreased harmonization of settlement cycles generally? Which markets would be impacted by such decreased harmonization? Could solutions be applied to mitigate the effects of de-harmonization? For example, to what extent could other asset classes, such as FX, transition to a shorter settlement cycle? What are the impediments to shortening settlement cycles for these other asset classes? Could FX transactions transition to a T+0 settlement cycle? Please explain.

133. Would certain non-U.S. markets move to a T+0 settlement cycle in response to a prospective move to T+0 in the U.S.?

134. How might shortening the standard settlement cycle to T+0 in the U.S. impact market participants who seek to fund cross-border transactions with the proceeds of an FX transaction?

135. To what extent might any adverse impact from increased settlement cycle mismatches be mitigated if the standard settlement cycle in the U.S. is shortened to T+1 prior to a move to a T+0 standard settlement cycle at a later time?

136. To what extent might monitoring of anticipated settlement-date balances change if the U.S. moved to a T+1 settlement cycle? How would such monitoring be impacted if the U.S. moved to a T+0 standard settlement cycle?

9. Dematerialization

Currently the vast majority of securities asset classes trading in the U.S. markets, including government securities, options, most mutual fund securities, and some municipal bonds, are issued in book-entry form only (*i.e.,* dematerialized).[273] In contrast, other

[269] *See* T+2 Proposing Release, *supra* note 30, at 69241–42.

[270] T+2 Adopting Release, *supra* note 10, at 15574.

[271] *Id.* at 15599. Both the T+2 Proposing Release and the T+2 Adopting Release stated that, because the settlement of FX transactions occurs on T+2, market participants who seek to fund a cross-border securities transaction with the proceeds of an FX transaction would, in a T+1 or T+0 environment, be required to settle the securities transaction before the proceeds of the FX transaction become available and would be required to pre-fund securities transactions in foreign currencies. Under these circumstances, a market participant would either incur opportunity costs and currency risk associated with holding FX reserves or be exposed to price volatility by delaying securities transactions by one business day to coordinate settlement of the securities and FX legs. *Id.*

[272] As noted earlier, U.S. equities securities have moved from settling T+5 to T+3 and more recently to T+2, while U.S. Treasury securities have settled on a T+1 basis throughout. Portfolios that invest globally have encountered mismatched settlement cycles, especially prior to October 6, 2014 when twenty-nine European markets moved to T+2 settlement in an effort to harmonize settlement times in Europe. *See* European Central Securities Depositories Association, A Very Smooth Transition to T+2, *https://ecsda.eu/archives/3793.*

[273] Dematerialization of securities occurs where securities owned by an investor are not represented

Continued

asset classes, such as listed equities, unlisted equities that have been admitted as DTC-eligible, and some debt securities, can be immobilized [274] using DTC and dematerialized using the Direct Registration System (''DRS'') services enabled by DTC's facilities, but many issuers of these equity and debt securities continue to allow their investors to obtain paper certificates.[275]

While the U.S. markets have made significant strides over the past twenty years in achieving immobilization and dematerialization, many industry representatives believe that the small percentage of securities held in certificated form impose unnecessary risk and expense to the industry and to investors.[276] Moreover, the ISG previously identified the dematerialization of securities certificates as a necessary building block to achieve shorter settlement timeframes.[277] The industry has long asserted that, despite the reduction in the use of paper certificates in the U.S. markets, certificates continue to pose risks, create inefficiencies and increase costs,[278] many of which will be exacerbated as the settlement cycle shortens. Fully transitioning from paper certificates to book-entry (*i.e.,* electronic records) would not only contribute to a more cost-effective, efficient, secure, and resilient marketplace by addressing operational issues related to record-keeping, inventory management, resilience and controls, but would facilitate a more efficient transition to shorter settlement cycles.[279]

The Commission has long advocated a reduction in the use of certificates in the trading environment by immobilizing or dematerializing securities and has acknowledged that the use of certificates increases the costs and risks of clearing and settling securities for all parties processing the securities, including those involved in the National C&S System.[280] Most of these costs and risks are ultimately borne by investors.[281] For example, in response to the COVID–19 pandemic, DTC suspended all physical securities processing services for approximately six weeks to minimize the risk of transmission of COVID–19 among its employees, who would otherwise be on site at DTC's vault that holds physical securities on deposit.[282] While this service disruption did not affect the electronic book-entry settlement of securities transactions, DTC instituted alternative methods of handling certain transactions, such as the use of letters of possession and an emergency rider in connection with underwriting new securities issues.[283]

The COVID–19 pandemic has highlighted the importance of continuing to immobilize or dematerialize the U.S. market to decrease risks and costs associated with physical certificates, but the Commission preliminarily believes that dematerialization is not a prerequisite to shortening the settlement cycle. Mechanisms in place today to facilitate immobilizing paper certificates can adequately address the risk and efficiency issues associated with such certificates (as evidenced by the COVID–19 example above), and can accommodate shorter settlement cycles, up to and including T+0. In particular, DRS provides a viable alternative to street-name holding for those investors who do not want to hold securities at a broker-dealer or who want their securities registered in their own

by paper certificates, and transfers of ownership of those securities are made through book-entry movements. For more information on issues related to the use of certificates in the U.S. Markets, *see* Concept Release, *supra* note 149, at 12932–34.

[274] Immobilization of securities occurs where the underlying certificate is kept in a securities depository (or held in custody for the depository by the issuer's transfer agent) or at a custodian and transfers of ownership are recorded through electronic book-entry movements between the depository or custodian's internal accounts. These types of securities are often referred to as being held in ''street name.'' An issue is partially immobilized (as is the case with most equity securities traded on an exchange), when the street name positions beneficially owned by investors are linked through chains of beneficial ownership through intermediaries (such as brokers) to the certificate immobilized at the securities depository, but certificates are still available to investors directly registered on the issuer's books. *Id.* at 12931 n.107; *see also* Exchange Act Release No. 76743 (Dec. 22, 2015), 80 FR 81948, 81952 n.39 (Dec. 31, 2015).

[275] DRS facilitates and automates the process whereby an investor, generally in equities, can establish a direct book-entry position registered in the investor's own name on the issuer's master securityholder file; such DRS issues are maintained by 61 transfer agents (as of December 31, 2021) that have been admitted to DRS by DTC (out of a total, as of September 30, 2021, of 403 registered transfer agents). Where an issuer has authorized ownership in book-entry form and is serviced by a transfer agent that has been admitted by DTC as DRS-eligible and an investor currently holds the securities in street name form in the investor's broker-dealer account, the investor can arrange, assuming the broker-dealer supports DRS servicing at DTC, to have its securities electronically withdrawn from the account and forwarded to the transfer agent. The procedure avoids the risks and custodial costs of moving certificates; in response to the investor's instruction to the broker-dealer, the investor's shares are changed into DRS form when the transfer agent receives an electronic file from DTC specifying the investor's details supplied by the broker-dealer, cancels the prior registration in the name of DTC's Cede & Co. nominee, and re-registers the securities directly in the investor's name, with the investor receiving a statement. Conversely, if the investor later elects to transfer the securities back to the investor's broker-dealer account (*i.e.,* change the form of ownership of the securities from DRS back into street-name form held through the broker-dealer account), the investor most commonly would request the broker-dealer to withdraw the securities from DRS, with the transfer agent re-registering the securities in the name of DTC's nominee, and the broker-dealer crediting the securities to the investor's account. Some frictions remain: DRS is not authorized by all issuers and not available for all registered securities types; a number of the transfer agents for DTC-eligible issues do not meet DTC's qualifications to participate in DRS; some brokers may not support DRS transfers or promptly process investors' instructions to facilitate the transfer of securities into DRS form. *See* Concept Release, *supra* note 139, at 12932.

[276] The processing of paper securities certificates has long been identified as an inefficient and risk-laden mechanism by which to hold and transfer ownership. Because paper certificates require manual processing and multiple touchpoints between investors and financial intermediaries, their use can result in significant delays and expenses in processing securities transactions and can raise risk concerns associated with lost, stolen, and forged certificates. *See id.* at 12930–31; Transfer Agents Operating Direct Registration System, Exchange Act Release No. 35038 (Dec. 1, 1994), 59 FR 63652, 63653 (Dec. 8, 1994) (''1994 Concept Release''); *see also* SIA Business Case Report, *supra* note 21, at 10; BCG Study, *supra* note 22, at 59, 62; DTCC, From Physical to Digital: Advancing the Dematerialization of U.S. Securities, at 4, 6 (Sept. 2020) (''DTCC 2020 Dematerialization White Paper''), *https://www.dtcc.com/-/media/Files/PDFs/DTCC-Dematerialization-Whitepaper-092020.pdf.*

[277] *See, e.g.,* William M. Martin, Jr., The Securities Markets: A Report with Recommendations, Submitted to The Board of Governors of the New York Stock Exchange (Aug. 5, 1971) (''Martin Report''), *https://www.sechistorical.org/collection/papers/1970/1971_0806_MartinReport.pdf.*

[278] *Id.* DTCC estimates that only a small portion of securities positions remains certificated and states that requests for certificates are declining, but also explains that the risks and costs associated with processing the remaining certificates in the marketplace are substantial and avoidable. *See* DTCC 2020 Dematerialization White Paper, *supra* note 276, at 4.

[279] *See* DTCC 2020 Dematerialization White Paper, *supra* note 276, at 11.

[280] Concept Release, *supra* note 149, at 12934. The Commission also stated in the Concept Release that, while investors should have the ability to register securities in their own names, it was time to explore ways to further reduce certificates in the trading environment due to the significant risk, inefficiency, and cost related to the use of securities certificates. *Id.* The possibility exists that investors' attachment to the certificate may be based more on sentiment than need, particularly in light of the fact that today non-negotiable records of ownership (*e.g.,* account statements) evidence ownership of not only most securities issued in the U.S. but also other financial assets, such as money in bank accounts. *See id.* at 12934–35. DRS allows an investor to have securities registered in the investor's name without having a certificate issued to the investor and the ability to electronically transfer securities between the investor's broker-dealer and the issuer's transfer agent without the risk and delays associated with the use of certificates. *Id.* at 12932.

[281] *Id.* at 12934.

[282] *See, e.g.,* DTCC, Important Notice (May 14, 2020), *https://www.dtcc.com/-/media/Files/pdf/2020/5/14/13402-20.pdf;* DTCC, Important Notice (Apr. 8, 2020), *https://www.dtcc.com/-/media/Files/pdf/2020/4/8/13276-20.pdf.*

[283] *See, e.g.,* DTCC, Important Notice (Mar. 12, 2020), *https://www.dtcc.com/-/media/Files/pdf/2020/3/13/13099-20.pdf.*

name.[284] Investors can use the linkages enabled by DTC to transfer their securities back and forth between DRS at the transfer agent and book-entry form on the books of a broker-dealer as it suits their needs.[285]

The key issues appear to be processing time and access to transfers between DRS at the transfer agent and book-entry form at the broker-dealer. With regard to processing time, the Commission is concerned that broker-dealer processes, whereby an investor requests that its broker-dealer change the investor's form of ownership from certificate form into street name form at the broker-dealer, can take days or weeks. Those processing timeframes will need to be significantly compressed or completed in real time to accommodate T+0. Broker-dealers might require investors to complete the process of transferring paper certificates into book-entry either through the transfer agent or the broker-dealer prior to trade execution, thereby allowing the broker-dealer assurances the securities can be delivered in time for settlement. With regard to access, only investors who have an issuer and transfer agent that offer DRS services can move their securities between DRS at the transfer agent and book-entry form at the broker-dealer.

The Commission is seeking comment on these issues, as well as a number of other issues related to the consideration of dematerialization as a building block to achieving T+0.

137. Is the elimination of the paper certificate necessary to achieve T+0? If so, why? If not, why?

138. Would further dematerialization, immobilization, or some combination thereof, without the elimination of the paper certificate, be sufficient to facilitate a T+0 settlement cycle? Please describe how and why this would or would not be the case.

139. If further dematerialization or immobilization is necessary to achieve T+0 settlement, what needs to be done on either an operational or regulatory basis to achieve such an objective? Please be as specific as possible, particularly where your answer relates to regulatory initiatives. For example, should the Commission consider mandating the dematerialization of certain types of securities? If so, which securities? Should such a mandate be limited to securities traded on an exchange, or focused on particular asset classes?

140. Should any potential requirements regarding dematerialization be imposed in stages or, instead, be comprehensive from the outset? For example, should such requirements be phased by addressing: (i) First, newly listed companies, (ii) then, new issues of securities by all listed companies, and (iii) all outstanding securities?

141. In order to better accommodate a T+0 environment, what changes, if any, would need to be made to broker-dealer processes for responding to investor requests to transfer investors' paper certificates into holdings in street-name book-entry form at the broker-dealer?

142. Do laws in other jurisdictions present any barriers to achieving complete dematerialization, such as laws that require an issuer to issue certificates or prohibit book-entry ownership? If so, please describe the jurisdictions and the specific laws that raise potential issues.

143. What are the costs and benefits with requiring investors who hold paper certificates to complete the transfer of such securities into book-entry prior to the execution of a trade?

V. Economic Analysis

The Commission is mindful of the economic effects that may result from the proposed amendments, including the benefits, costs, and the effects on efficiency, competition, and capital formation.[286] This section analyzes the expected economic effects of the proposed rules relative to the current baseline, which consists of the current market and regulatory framework.

This economic analysis begins with a discussion of the risks inherent in the settlement cycle and how a reduction in the cycle's length may affect the management and mitigation of these risks. Next, it discusses market frictions that potentially impair the ability of market participants to shorten the settlement cycle in the absence of a Commission rule. These settlement cycle risks and market frictions frame our subsequent analysis of the rule's benefits and costs. The Commission preliminarily believes that the proposed amendment to Exchange Act Rule 15c6–1(a) and the proposed deletion of Exchange Act Rule 15c6–1(c) ameliorate some or all of these market frictions and thus reduce the risks inherent in the settlement process.

The Commission preliminarily believes that, to successfully shorten the settlement timeframes to T+1 while minimizing settlement fails in the institutional trade processing environment, will require further enhancing automation, standardization, and the percentage of trades that are allocated, confirmed, and affirmed by the end of the trade date.[287] To this end the Commission is also proposing (i) new Rule 15c6–2 to require that, where parties have agreed to engage in an allocation, confirmation, or affirmation process, a broker or dealer would be prohibited from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) on behalf of a customer unless such broker or dealer has entered into a written agreement with the customer that requires the allocation, confirmation, affirmation, or any combination thereof, be completed no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with Rule 15c6–1(a),[288] (ii) an amendment to Rule 204–2 under the Advisers Act to require investment advisers that are parties to agreements under Exchange Act Rule 15c6–2 to maintain a time stamped record of confirmations received, and when allocations and affirmations were sent to a broker or dealer,[289] and (iii) new Rule 17Ad–27 under the Exchange Act to require policies and procedures that require CMSPs facilitate the ongoing development of operational and technological improvements associated with institutional trade processing,

[284] Due to the expanded use in today's market, DRS is considered a viable alternative to holding physical certificates, allowing transfers to be made relatively quickly and without the risk and delays associated with the use of certificates. *See* DTCC 2020 Dematerialization White Paper, *supra* note 276, at 4 n.2.

[285] Specifically, DTC participants can use the linkages enabled by DTC and qualified FAST transfer agents to withdraw securities electronically. Upon the investor's request, a broker can use DRS, if available for the particular securities issue, to transfer securities from the broker's account (where it is in DTC's nominee registration) to be held in an investor's own name on the transfer agent's book. DTC's balance in that security drops and the investor receives a statement of its holdings, rather than a certificate.

[286] Exchange Act Section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

[287] *See supra* Part III.B.2; *infra* Part V.C.

[288] *See supra* Part III.B.

[289] *See supra* Part III.C.

which may in turn also facilitate further shortening of the settlement cycle in the future.[290]

The discussion of the economic effects of the proposed amendment to Rule 15c6–1(a), the proposed deletion of Rule 15c6–1(c), the proposed Rule 15c6–2, the proposed amendment to Rule 204–2, and the proposed Rule 17Ad–27 begins with a baseline of current practices. The economic analysis then discusses the likely economic effects of the proposal as well as its effects on efficiency, competition, and capital formation. The Commission has, where practicable, attempted to quantify the economic effects expected to result from this proposal. In some cases, however, data needed to quantify these economic effects is not currently available or otherwise publicly available. As noted below, the Commission is unable to quantify certain economic effects and solicits comment, including estimates and data from interested parties, that could help inform the estimates of the economic effects of the proposal.

A. Background

As previously discussed, the proposed amendment to Rule 15c6–1(a) would prohibit, unless otherwise expressly agreed to by both parties at the time of the transaction, a broker-dealer from effecting or entering into a contract for the purchase or sale of certain securities that provides for payment of funds and delivery of securities later than the first business day after the date of the contract subject to certain exceptions provided in the rule. In its analysis of the economic effects of the proposal, the Commission has considered the risks that market participants, including broker-dealers, clearing agencies, and institutional and retail investors are exposed to during the settlement cycle and how those risks change with the length of the cycle.

The settlement cycle spans the time between when a trade is executed and when cash and securities are delivered to the seller and buyer, respectively. During this time, each party to a trade faces the risk that its counterparty may fail to meet its obligations to deliver cash or securities. When a counterparty fails to meet its obligations to deliver cash or securities, the non-defaulting party may bear costs as a result. For example, if the non-defaulting party chooses to enter into a new transaction, it will be with a new counterparty and will occur at a potentially different price.[291] The length of the settlement cycle influences this risk in two ways: (i) Through its effect on counterparty exposures to price volatility, and (ii) through its effect on the value of outstanding obligations.

First, additional time allows asset prices to move further away from the price of the original trade. For example, in a simplified model where daily asset returns are statistically independent, the variance of an asset's return over t days is equal to t multiplied by the daily variance of the asset's return. Thus when the daily variance of returns is constant, the variance of returns increases linearly in the number of days.[292] In other words, the more days that elapse between when a trade is executed and when a counterparty defaults, the larger the variance of price change will be, and the more likely that the asset's price will deviate from the execution price. The price change could be positive or negative, but in the event of a price increase, the buyer must pay more than the original execution price, and in the event of a price decrease, the buyer may buy the security for less than the original execution price.[293]

Second, the length of the settlement cycle directly influences the quantity of transactions awaiting settlement. For example, assuming no change in transaction volumes, the volume of unsettled trades under a T+1 settlement cycle is approximately half the volume of unsettled trades under a T+2 settlement cycle.[294] Thus, in the event of a default, counterparties would have to enter into a new transaction, or otherwise close out approximately half as many trades under a T+1 standard settlement cycle than under a T+2 standard. This means that for a given adverse move in prices, the financial losses resulting from a counterparty default will be approximately half as large under a T+1 standard settlement cycle.

Market participants manage and mitigate settlement risk in a number of specific ways.[295] Generally, these methods entail costs to market participants. In some cases, these costs may be explicit. For instance, clearing brokers typically explicitly charge introducing brokers to clear trades. Other costs are implicit, such as the opportunity cost of assets posted as collateral or limits placed on the trading activities of a broker's customers.

The Commission acknowledges that, given current trading volumes and complexity, certain market frictions may prevent securities markets from shortening the settlement cycle in the absence of regulatory intervention. The Commission has considered two key market frictions related to investments required to implement a shorter settlement cycle. The first is a coordination problem that arises when some of the benefits of actions taken by one or more market participants are only realized when other market participants take a similar action. For example, under the current regulatory structure, if a particular institutional investor were to make a technological investment to reduce the time it requires to match and allocate trades without a corresponding action by its clearing broker-dealers, the institutional investor cannot fully realize the benefits of its investment, as the settlement process is limited by the capabilities of the clearing agency for trade matching and allocation. More generally, when every market participant must bear the costs of an upgrade for the entire market to enjoy a benefit, the result is a coordination problem, where each market participant may be reluctant to make the necessary investments until it can be reasonably certain that others will also do so. In general, these coordination problems may be resolved if all parties can credibly commit to the necessary infrastructure investments. Regulatory intervention is one possible way of coordinating market participants to undertake the investments necessary to support a shorter settlement cycle. Such intervention could come through Commission rulemaking or through a coordinated set of SRO rule changes.

In addition to coordination problems, a second market friction related to the settlement cycle involves situations where one market participant's

[290] *See supra* Part III.D.

[291] This applies to the general case of a transaction that is not novated to a CCP. As described above, in its role as a CCP, NSCC becomes counterparty to both initial parties to a centrally cleared transaction. In the case of such transactions, while each initial party is not exposed to the risk that its original counterparty defaults, both are exposed to the risk of CCP default. Similarly, the CCP is exposed to the risk that either initial party defaults.

[292] More generally, because total variance over multiple days is equal to the sum of daily variances and variables related to the correlation between daily returns, total variance increases with time so long as daily returns are not highly negatively correlated. *See, e.g.,* Morris H. DeGroot, *Probability and Statistics* 216 (Addison-Wesley Publishing Co., 1986).

[293] Similarly, a seller whose counterparty fails faces similar risks with respect to the security price but in the opposite direction.

[294] The relationship is approximate because some trades may settle early or, if both counterparties agree at the time of the transaction, settle after the time limit in Rule 15c6–1(a).

[295] *See* T+2 Proposing Release, *supra* note 30, at 69251 (discussing the entities that compose the clearance and settlement infrastructure for U.S. securities markets).

investments result in benefits for other market participants. For example, if a market participant invests in a technology that reduces the error rate in its trade matching, not only does it benefit from fewer errors, but its counterparties and other market participants may also benefit from more robust trade matching. However, because market participants do not necessarily take into account the benefits that may accrue to other market participants (also known as ''externalities'') when market participants choose the level of investment in their systems, the level of investment in technologies that reduce errors might be less than efficient for the entire market. More generally, underinvestment may result because each participant only takes into account its own costs and benefits when choosing which infrastructure improvements or investments to make, and does not take into account the costs and benefits that may accrue to its counterparties, other market participants, or financial markets generally.

Moreover, because market participants that incur similar costs to move to a shorter settlement cycle may nevertheless experience different levels of economic benefits, there is likely heterogeneity across market participants in the demand for a shorter settlement cycle. This heterogeneity may exacerbate coordination problems and underinvestment. Market participants that do not expect to receive direct benefits from settling transactions earlier may lack incentives to invest in infrastructure to support a shorter settlement cycle and thus could make it difficult for the market as a whole to realize the overall risk reduction that the Commission believes a shorter settlement cycle may bring.

For example, the level and nature of settlement risk exposures vary across different types of market participants. A market participant's characteristics and trading strategies can influence the level of settlement risk it faces. For example, large market participants will generally be exposed to more settlement risk than small market participants because they trade in larger volume. However, large market participants also trade across a larger variety of assets and may face less idiosyncratic risk in the event of counterparty default if the portfolio of trades that may have to be replaced is diversified.[296] As a corollary, a market participant who trades a single security in a single direction against a given counterparty may face more idiosyncratic risk in the event of counterparty failure than a market participant who trades in both directions with that counterparty.

Furthermore, the extent to which a market participant experiences any economic benefits that may stem from a shortened standard settlement cycle likely depends on the market participant's relative bargaining power. While larger intermediaries may experience direct benefits from a shorter settlement cycle as a result of being required to post less collateral with a CCP, if they do not effectively compete for customers through fees and services as a result of market power, they may pass only a portion of these cost savings through to their customers.[297]

The Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a), which would shorten the standard settlement cycle from T+2 to T+1 may mitigate the market frictions of coordination and underinvestment described above. The Commission believes that by mitigating these market frictions and for the reasons discussed below, the transition to a shorter standard settlement cycle will reduce the risks inherent in the clearance and settlement process.

The shorter standard settlement cycle might also affect the level of operational risk in the National C&S System. Shortening the settlement cycle by one day would reduce the time that market participants have to resolve any errors that might occur in the clearance and settlement process. Tighter operational timeframes and linkages required under a shorter standard settlement cycle might introduce new fragility that could affect market participants, specifically an increased risk that operational issues could affect transaction processing and related securities settlement.[298]

In part to lessen the likelihood that shortening the settlement cycle might negatively affect operational risk, the Commission and market participants have emphasized on multiple occasions the importance of accelerating the institutional trade clearance and settlement process by improving, among other things, the allocation, confirmation and affirmation processes for the clearance and settlement of institutional trades, as well as improvements to the provision of central matching and electronic trade confirmation.[299] A 2010 DTCC paper published when the standard settlement cycle in the U.S. was still T+3, described same-day affirmation as ''a prerequisite'' of shortening the settlement cycle because of its impact on settlement failure rates and operational risk.[300] According to previously cited statistics published by DTCC in 2011 regarding affirmation rates achieved through industry utilization of a certain matching/ETC provider, on average, 45% of trades were affirmed on trade date, 90% were affirmed by T+1, and 92% were affirmed by noon on T+2.[301] Currently, only about 68% of trades achieve affirmation by 12:00 midnight at the end of trade date.[302] While these numbers have improved over time, the improvements have been incremental and fallen short of achieving an affirmed confirmation by the end of trade date as is considered a securities industry best practice.[303] Accordingly, and as described more fully below, to achieve the maximum efficiency and risk reduction that may result from completing the allocation, confirmation and affirmation process on trade date, and to facilitate shortening the settlement cycle to T+1 or shorter, the Commission is proposing new Rule 15c6–2 under the Exchange Act to facilitate trade date completion of institutional trade allocations, confirmations and affirmations.

B. Economic Baseline and Affected Parties

The Commission uses as its economic baseline the clearance and settlement process as it exists at the time of this proposal. In addition to the current process that is described in Part II.B above, the baseline includes rules adopted by the Commission, including Commission rules governing the clearance and settlement system, SRO

[296] *See* Ananth Madhavan et al., *Risky Business: The Clearance and Settlement of Financial Transactions* 4–5 (U. Pa. Wharton Sch. Rodney L. White Ctr. for Fin. Res. Working Paper No. 40–88, 1988), *https://rodneywhitecenter.wharton.upenn.edu/wp-content/uploads/2014/04/8840.pdf; see also* John H. Cochrane, *Asset Pricing* 15 (Princeton Univ. Press rev. ed. 2009) (defining the idiosyncratic component of any payoff as the part that is uncorrelated with the discount factor).

[297] *See infra* Parts V.C.1 (Benefits) and V.C.2 (Costs).

[298] For example, the ability to compute an accurate net asset value (''NAV'') within the settlement timeframe is a key component for settlement of ETF transactions. *See, e.g.,* Barrington Partners White Paper, An Extraordinary Week: Shared Experiences from Inside the Fund Accounting Systems Failure of 2015 (Nov. 2015), *https://www.mfdf.org/docs/default-source/fromjoomla/uploads/blog_files/sharedexperiencefromfasystemfailure2015.pdf.*

[299] *See supra* Part III.B; *see also supra* notes 146–148 and accompanying text.

[300] *See supra* note 155.

[301] *See supra* note 156.

[302] *See supra* note 157.

[303] *See supra* note 57.

rules,[304] as well as rules adopted by regulators in other jurisdictions to regulate securities settlement in those jurisdictions. The following section discusses several additional elements of the baseline that are relevant for the economic analysis of the proposed amendment to Rule 15c6–1(a) because they are related to the financial risks faced by market participants that clear and settle transactions and the specific means by which market participants manage these risks.

1. Central Counterparties

NSCC, a subsidiary of DTCC, is a clearing agency registered with the Commission that operates the CCP for U.S. equity securities transactions.[305] One way that NSCC mitigates the credit, market, and liquidity risk that it assumes through its novation and guarantee of trades as a CCP is by multilateral netting of securities trades' delivery and payment obligations across its members. By offsetting its members' obligations, NSCC reduces the aggregate market value of securities and cash it must deliver to clearing members. While netting reduces NSCC's settlement payment obligations by a daily average of 98%,[306] it does not fully eliminate the risk posed by unsettled trades because NSCC is responsible for payments or deliveries on any trades that it cannot fully net. NSCC reported clearing an average of approximately $2.251 trillion each day during the first quarter of 2021,[307] suggesting an average net settlement obligation of approximately $45 billion each day.[308]

The aggregate settlement risk faced by NSCC is also a function of the probability of clearing member default. NSCC manages the risk of clearing member default by imposing certain financial responsibility requirements on its members. For example, as of 2021, broker-dealer members of NSCC that are not municipal securities brokers and do not intend to clear and settle transactions for other broker-dealers must have excess net capital of $500,000 over the minimum net capital requirement imposed by the Commission and $1,000,000 over the minimum net capital requirement if the broker-dealer member clears for other broker-dealers.[309] Furthermore, each NSCC member is subject to other ongoing membership requirements, including a requirement to furnish NSCC with assurances of the member's financial responsibility and operational capability, including, but not limited to, periodic reports of its financial and operational condition.[310]

In addition to managing the member default risk, NSCC also takes steps to mitigate the impacts of a member default. For example, in the normal course of business, CCPs are generally not exposed to market or liquidity risk because they expect to receive every security from a seller they are obligated to deliver to a buyer and they expect to receive every payment from a buyer that they are obligated to deliver to a seller. However, when a clearing member defaults, the CCP can no longer expect the defaulting member to deliver securities or make payments. CCPs mitigate this risk by requiring clearing members to make contributions of financial resources to the CCP so that it may make payments or deliver securities in the event of a member default. The level of financial resources CCPs require clearing members to commit may be based on, among other things, the market and liquidity risk of a member's portfolio, the correlation between the assets in the member's portfolio and the member's own default probability, and the liquidity of the assets posted as collateral.

2. Market Participants—Investors, Broker-Dealers, and Custodians

As discussed in Part II.B, broker-dealers serve both retail and institutional customers. Aggregate statistics from the Board of Governors of the Federal Reserve System suggest that at the end of the second quarter 2021, U.S. households held approximately 40% of the value of corporate equity outstanding, and 57% of the value of mutual fund shares outstanding, which provide a general picture of the share of holdings by retail investors.[311]

In the third quarter of 2021, approximately 3,500 broker-dealers filed FOCUS Reports[312] with FINRA. These firms varied in size, with median assets of approximately $1.3 million and average assets of approximately $1.5 billion. The top 1% of broker-dealers held 81% of the assets of broker-dealers overall, indicating a high degree of concentration in the industry. Of the approximately 3,500 filers, as of the end of 2020, 156 reported self-clearing public customer accounts, while 1,126 reported acting as an introducing broker and sending orders to another broker-dealer for clearing and not self-clearing. Broker-dealers that identified themselves as self-clearing broker-dealers, on average, had higher total assets than broker-dealers that identified themselves as introducing broker-dealers. While the decision to self-clear may be based on many factors, this evidence is consistent with the argument that there may currently be high barriers to entry for providing clearing services as a broker-dealer.

Clearing broker-dealers face liquidity risks as they are obligated to make payments to clearing agencies on behalf of customers who purchase securities. As discussed in more detail below, because customers of a clearing broker may default on their payment obligations to the broker, particularly when the price of a purchased security declines before settlement, clearing broker-dealers routinely seek to reduce the risks posed by their customers. For example, clearing broker-dealers may require customers to contribute financial resources in the form of margin to margin accounts, to pre-fund purchases in cash accounts, or may restrict the use of customers' unsettled funds. These measures are in many ways analogous to measures taken by clearing agencies to reduce and mitigate the risks posed by their clearing members. In addition, clearing broker-dealers may also mitigate the risks

[304] Certain SRO rules currently define ''regular way'' settlement as occurring on T+2 and, as such, would need to be amended in connection with shortening the standard settlement cycle to T+1. *See, e.g.,* MSRB Rule G–12(b)(ii)(B); FINRA Rule 11320(b). Further, certain timeframes or deadlines in SRO rules key off the current settlement date, either expressly or indirectly. In such cases, the SROs may also need to amend these rules. *See supra* Part III.E.5 (further discussing the impact of the proposal on SRO rules and operations).

[305] A second DTCC subsidiary, DTC, also a clearing agency registered with the Commission, operates a CSD with respect to securities transactions in the U.S. in several types of eligible securities including, among others, equities, warrants, rights, corporate debt and notes, municipal bonds, government securities, asset-backed securities, depositary receipts and money market instruments.

[306] *See supra* note 62.

[307] *See* NSCC, Q1 2021 Fixed Income Clearing Corporation and NSCC Quantitative Disclosure for Central Counterparties, at 20 (June 2021), *http://www.dtcc.com/legal/policy-and-compliance.*

[308] Calculated as $2.251 trillion × 2% = $45.02 billion.

[309] For a description of NSCC's financial responsibility requirements for registered broker-dealers, *see* NSCC Rules and Procedures, at 336 (effective Jan. 24, 2022) (''NSCC Rules and Procedures''), *https://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.* Pursuant to Rule 11 and Addendum K to NSCC's Rules and Procedures, NSCC guarantees the completion of CNS settling trades (''NSCC trade guaranty'') that have been validated. *Id.* at 74–79, 363.

[310] *See, e.g., id.* at 89.

[311] *See* Board of Governors of the Federal Reserve System, Statistical Release Z.1, Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, at 130 (Sept. 23, 2021), available at *https://www.federalreserve.gov/releases/z1/20210923/z1.pdf.*

[312] FOCUS Reports, or ''Financial and Operational Combined Uniform Single'' Reports, are monthly, quarterly, and annual reports that broker-dealers generally are required to file with the Commission and/or SROs pursuant to Exchange Act Rule 17a–5, 17 CFR 240.17a–5.

posed by customers by charging higher transaction fees that reflect the value of the customer's option to default, thereby causing customers to internalize the cost of default that is inherent in the settlement process.[313] While not directly reducing the risk posed by customers to clearing members, these higher transaction fees at least allocate to customers a portion of the expected direct costs of customer default.

Another way the settlement cycle may affect transaction prices involves the potential use of funds during the settlement cycle. To the extent that buyers may use the cash to purchase securities during the settlement cycle for other purposes, they may derive value from the length of time it takes to settle a transaction. Testing this hypothesis, studies have found that sellers demand compensation for the benefit that buyers receive from deferring payment during the settlement cycle and that this compensation is incorporated in equity returns.[314]

The settlement process also exposes investors to certain risks. The length of the settlement cycle sets the minimum amount of time between when an investor places an order to sell securities and when the customer can expect to have access to the proceeds of that sale. Investors take this into account when they plan transactions to meet liquidity needs. For example, under T+2 settlement, investors who experience liquidity shocks, such as unexpected expenses that must be met within one day, could not rely on obtaining funding solely through a sale of securities because the proceeds of the sale would not typically be available until the end of the second day after the sale. One possible strategy to deal with such a shock under T+2 settlement would be to borrow to meet payment obligations on day T+1 and repay the loan on the following day with the proceeds from a sale of securities, incurring the cost of one day of interest. Another strategy that investors may use is to hold financial resources to insure themselves from liquidity shocks.

[313] *See infra* Parts V.C.2 and V.C.4.

[314] *See* Victoria Lynn Messman, Securities Processing: The Effects of a T+3 System on Security Prices (May 2011) (Ph.D. dissertation, University of Tennessee—Knoxville), *http://trace.tennessee.edu/utk_graddiss/1002/;* Josef Lakonishok & Maurice Levi, *Weekend Effects on Stock Returns: A Note,* 37 J. Fin. 883 (1982), *https://www.jstor.org/stable/pdf/2327716.pdf;* Ramon P. DeGennaro, *The Effect of Payment Delays on Stock Prices,* 13 J. Fin. Res. 133 (1990), *http://onlinelibrary.wiley.com/doi/10.1111/j.1475-6803.1990.tb00543.x/abstract.*

3. Investment Companies and Investment Advisers

Shares issued by investment companies may settle on different timeframes. ETFs, certain closed-end funds, and mutual funds that are sold by brokers generally settle on T+2.[315] By contrast, mutual fund shares that are directly purchased from the fund generally settle on T+1. Mutual funds that settle on a different basis than the underlying investments currently face liquidity risk as a result of a mismatch between the timing of mutual fund share transaction settlement and the timing of fund portfolio security transaction order settlements. Mutual funds may manage these particular liquidity needs by, among other methods, using cash reserves, back-up lines of credit, or interfund lending facilities to provide cash to cover the settlement mismatch.[316] As of the end of 2020, there were 11,323 open-end funds (including money market funds and ETFs).[317] The assets of these funds were approximately $29.3 trillion.[318] Of the 11,323 funds noted, 2,296 were ETFs with combined assets of $5.5 trillion.[319]

Under Section 22(e) of the Investment Company Act, an open-end fund generally is required to pay shareholders who tender shares for redemption within seven days of their tender.[320] Open-end fund shares that are sold through broker-dealers must be redeemed within two days of a redemption request because broker-dealers are subject to Rule 15c6–1(a).

Furthermore, Rule 22c–1 under the Investment Company Act,[321] the ''forward pricing'' rule, requires funds, their principal underwriters, and dealers to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to purchase or redeem fund shares, even though cash proceeds from purchases may be invested or fund assets may be sold in subsequent days in order to satisfy purchase requests or meet redemption obligations.

[315] *See supra* note 84.

[316] *See* Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, Investment Company Act Release No. 31835 (Sept. 22, 2015), 80 FR 62274, 62285 n.100 (Oct. 15, 2015).

[317] *See* ICI, 2021 Investment Company Fact Book, at 40 (May 2021) (''2021 ICI Fact Book''), available at *https://www.ici.org/.* This comprises 9,027 open-end mutual funds, including mutual funds that invest primarily in other mutual funds, and 2,296 ETFs, including ETFs that invest primarily in other ETFs.

[318] *See id.* at 41.

[319] *See id.* at 40–41.

[320] 15 U.S.C. 80a–22(e).

[321] 17 CFR 270.22c–1.

Based on Investment Adviser Registration Depository data as of December 2020, approximately 13,804 advisers registered with the Commission are required to maintain copies of certain books and records relating to their advisory business. The Commission further estimates that 2,521 registered advisers required to maintain copies of certain books and records relating to their advisory business would not be required to make and keep the proposed required records because they do not have any institutional advisory clients.[322] Therefore, the remaining 11,283 of these advisers, or 81.74% of the total registered advisers required to maintain copies of certain books and records relating to their advisory business, would enter a contract with a broker or dealer under proposed Rule 15c6–2 and therefore be subject to the related proposed amendment to Rule 204–2 under the Advisers Act (*i.e.,* to retain copies of confirmations received, and any allocation and each affirmation sent, with a date and time stamp for each allocation (if applicable) and affirmation that indicates when the allocation or affirmation was sent to the broker or dealer).

4. Current Market for Clearance and Settlement Services

As described in Part II.B, two affiliated entities, NSCC and DTC, facilitate clearance and settlement activities in U.S. securities markets in most instances. There is limited competition in the provision of the services that these entities provide. NSCC is the CCP for trades between broker-dealers involving equity securities, corporate and municipal debt, and UITs for the U.S. market. DTC is the CSD that provides custody and book-entry transfer services for the vast majority of securities transactions in the U.S. market involving equities, corporate and municipal debt, money market instruments, ADRs, and ETFs. CMSPs electronically facilitate communication among a broker-dealer, an institutional investor or its investment adviser, and the institutional investor's custodian to reach agreement on the details of a securities trade, thereby creating binding terms.[323] As discussed further in Part III.D, FINRA currently requires broker-dealers to use a clearing agency, such as DTC or a CMSP, or a qualified vendor under the

[322] *See infra* note 425.

[323] *See supra* Part II.B.1; *see also* T+2 Proposing Release, *supra* note 30, at 69246.

rule to complete delivery-versus-payment transactions with their customers.[324]

Broker-dealers compete to provide services to retail and institutional customers. Based on the large number of broker-dealers, there is likely a high degree of competition among broker-dealers. However, the markets that broker-dealers serve may be segmented along lines relevant for the analysis of competitive effects of the proposed amendment to Rule 15c6–1(a). As noted above, the number of broker-dealers that self-clear public customer accounts is smaller than the set of broker-dealers that introduce and do not self-clear. This could mean that introducing broker-dealers compete more intensively for customers than clearing broker-dealers. Further, clearing broker-dealers must meet requirements set by NSCC and DTC, such as financial responsibility requirements and clearing fund requirements. These requirements represent barriers to entry for brokers that may wish to become clearing broker-dealers, limiting competition among such entities.

Competition for customers affects how the costs associated with the clearance and settlement process are allocated among market participants. In managing the expected costs of risks from their customers and the costs of compliance with SRO and Commission rules, clearing broker-dealers decide what fraction of these costs to pass through to their customers in the form of fees and margin requirements, and what fraction of these costs to bear themselves. The level of competition that a clearing broker-dealer faces for customers will dictate the extent to which it is able to pass these costs through to its customers.

In addition, several factors affect the current levels of efficiency and capital formation in the various functions that make up the market for clearance and settlement services. First, at a general level, market participants occupying various positions in the clearance and settlement system must post or hold liquid financial resources, and the level of these resources is a function of the length of the settlement cycle. For example, NSCC collects clearing fund contributions from members to help ensure that it has sufficient financial resources in the event that one of its members defaults on its obligations to NSCC. As discussed above, the length of the settlement cycle is one determinant of the size of NSCC's exposure to clearing members. As another example, mutual funds may manage liquidity needs by, among other methods, using cash reserves, back-up lines of credit, or interfund lending facilities to provide cash. These liquidity needs, in turn, are related to the mismatch between the timing of mutual fund transaction order settlements and the timing of fund portfolio security transaction order settlements.

Holding liquid assets solely for the purpose of mitigating counterparty risk or liquidity needs that arise as part of the settlement process could represent an allocative inefficiency. That is, because firms that are required to hold these assets might prefer to put them to alternative uses and because these assets may be more efficiently allocated to other market participants who value them for their fundamental risk and return characteristics rather than for their value as collateral. To the extent that any intermediaries between buyer and seller who facilitate clearance and settlement of the trade bear costs as a result of inefficient allocation of collateral assets, these inefficiencies may be reflected in higher transaction costs.

The settlement cycle may also have more direct impacts on transaction costs. As noted above, clearing broker-dealers may charge higher transaction fees to reflect the value of the customer's option to default and these fees may cause customers to internalize the cost of the default options inherent in the settlement process. However, these fees also make transactions more costly and may influence the willingness of market participants to efficiently share risks or to supply liquidity to securities markets. Taken together, inefficiencies in the allocation of resources and risks across market participants may serve to impair capital formation.

Finally, market participants may make processing errors in the clearance and settlement process.[325] Market participants have stated that manual processing and a lack of automation result in processing errors.[326] Although some of these errors may be resolved within the settlement cycle and not result in a failed trade, those that are not may result in failed trades, which appear in the failure to deliver data.[327] Further, market participants may incorporate the likelihood that processing errors result in delays in payments or deliveries into securities prices.[328]

Figure 5 shows total fails to deliver in shares by month from January 2016 through November 2021. The change in the U.S. settlement cycle from T+3 to T+2 became effective in September 2017. Although processing errors are only one reason a trade may result in a fail to deliver, there is no marked change in the fails data around the previous shortening of the settlement cycle.

[324] *See supra* note 181 and accompanying text.

[325] *See, e.g.,* Omgeo Study, *supra* note 155, at 12; *see also* T+1 Report, *supra* note 18, at 26.

[326] Matthew Stauffer, Managing Director, Head of Institutional Trade Processing at DTCC, stated, ''The findings of our survey highlight the benefits of leveraging automated post-trade solutions to reduce the costs of operational functions and the risk inherent in manual processes.'' *See* DTCC, DTCC Identifies Seven Areas of Broker Cost Savings as a Result of Greater Post-Trade Automation (Nov. 18, 2020), *https://www.dtcc.com/news/2020/november/18/dtcc-identifies-seven-areas-of-broker-cost-savings-as-a-result-of-greater-post-trade-automation*;

[327] *See* Statement by The Depository Trust & Clearing Corporation, U.S. Securities and Exchange Commission Securities Lending and Short Sales Roundtable, at 3 (Sept. 30, 2009), *https://www.sec.gov/comments/4-590/4590-32.pdf; see also* T+1 Report, *supra* note 18, at 26.

[328] *See* Messman, *supra* note 314.

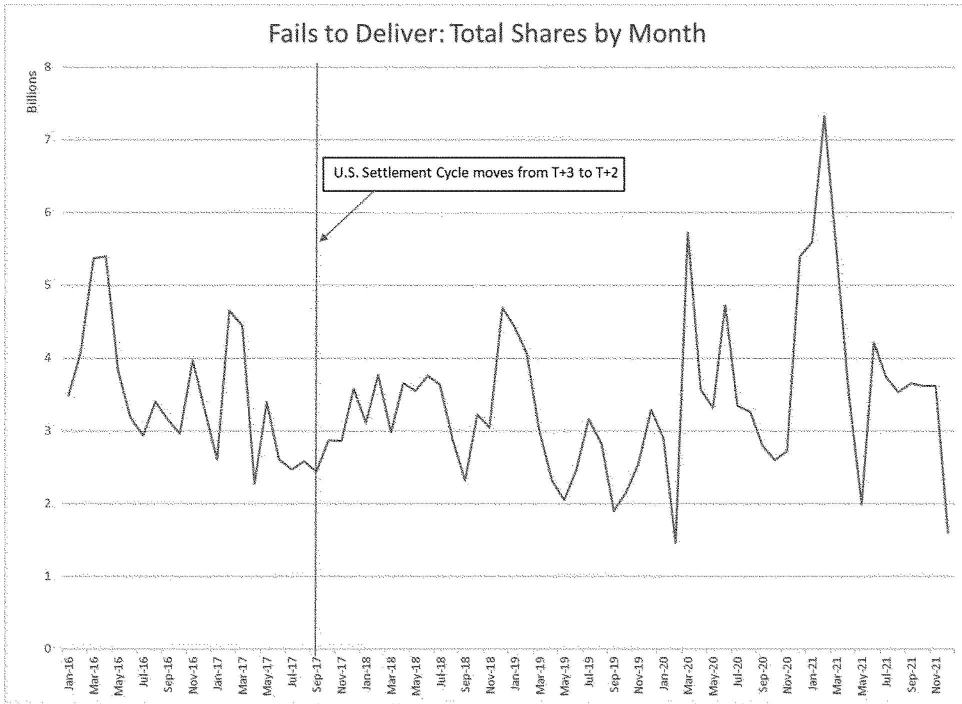


Figure 5. *Monthly fails to deliver in shares.*

C. Analysis of Benefits, Costs, and Impact on Efficiency, Competition, and Capital Formation

1. Benefits

The proposed amendment and new rules would likely yield benefits associated with the reduction of risk in the settlement cycle. By shortening the settlement cycle, the proposed amendment would reduce both the aggregate market value of all unsettled trades and the amount of time that CCPs or the counterparties to a trade may be subject to market and credit risk from an unsettled trade.[329] First, holding transaction volumes constant, the market value of transactions awaiting settlement at any given point in time under a T+1 settlement cycle will be approximately one half lower than under the current T+2 settlement cycle. Using the risk mitigation framework described in Part V.B.1, based on published statistics from the first quarter of 2021 [330] and holding average dollar volumes constant, the aggregate notional value of unsettled transactions at NSCC would fall from nearly $90 billion to approximately $45 billion.[331]

Second, a market participant that experiences counterparty default and enters into a new transaction under a T+2 settlement cycle is exposed to more market risk than would be the case under a T+1 settlement cycle. As a result, market participants that are exposed to market, credit, and liquidity risks would be exposed to less risk under a T+1 settlement cycle. This reduction in risk may also extend to mutual fund transactions conducted with broker-dealers that currently settle on a T+2 basis.[332] To the extent that these transactions currently give rise to counterparty risk exposures between mutual funds and broker-dealers, these exposures may decrease as a consequence of a shorter settlement cycle. In addition, a shorter standard settlement cycle would reduce liquidity risks that could arise by allowing investors to obtain the proceeds of securities transactions sooner. These risks affect all market participants, are difficult to diversify away, and require resources to manage and mitigate.

CCPs require clearing members to post financial resources in order to secure members' obligations to deliver cash and securities to the CCP. Clearing members in turn impose fees on their customers, *e.g.,* introducing broker-dealers, institutional investors, and retail investors. The margin requirements required by the CCP are a function of the risk posed to the CCP by the potential default of the clearing member. That risk is a function of several factors including the value of trades submitted for clearing but not yet settled and the volatility of the securities prices that make up those unsettled trades. As these factors are an increasing function of the time to settlement, by reducing settlement from T+2 to T+1, a CCP may require less collateral from its members, and the CCP's members may, in turn, reduce fees that they may pass down to other market participants, including introducing broker-dealers, institutional investors, and retail investors.

Any reduction in clearing broker-dealers' required margin would provide multiple benefits. First, financial resources that are used to mitigate the risks of the clearance and settlement process can be put to alternative uses. Reducing the financial risks associated with the overall clearance and settlement process would reduce the amount of collateral required to mitigate these risks, which would reduce the costs that market participants bear to manage and mitigate these risks and the allocative inefficiencies that may stem

[329] *See supra* Part III.A.2.

[330] *See supra* note 307, at 14.

[331] *See id.* at 20.

[332] In today's environment, ETFs and certain closed-end funds clear and settle on a T+2 basis. Open-end funds (*i.e.,* mutual funds) generally settle on a T+1 basis, except for certain retail funds which typically settle on T+2. Thus, the proposed amendment to Rule 15c6–1(a) would require ETFs, closed-end funds, and mutual funds settling on a T+2 basis to revise their settlement timeframes.

from risk management practices.[333] Second, assets that are valuable because they are particularly suited to meeting financial resource obligations may be better allocated to market participants that hold these assets for their fundamental risk and return characteristics. This improvement in allocative efficiency may improve capital formation.

A portion of the savings from less costly risk management under a T+1 standard settlement cycle relative to a T+2 standard settlement cycle may flow through to investors. Investors may be able to profitably redeploy financial resources that were once needed to fund higher clearing fees, for example.

Market participants might also individually benefit through reduced clearing fund deposit requirements. In 2012, the BCG Study estimated that cost reductions related to reduced clearing fund contributions resulting from moving from a T+3 to a T+2 settlement cycle would amount to $25 million per year.[334] In addition, a shorter settlement cycle might reduce liquidity risk by allowing investors to obtain the proceeds of their securities transactions sooner. Reduced liquidity risk may be a benefit to individual investors, but it may also reduce the volatility of securities markets by reducing liquidity demands in times of adverse market conditions, potentially reducing the correlation between market prices and the risk management practices of market participants.[335]

Shortening the settlement cycle may reduce incentives for investors to trade excessively in times of high volatility.[336] Such incentives exist because investors do not always bear the full cost of settlement risk for their trades. Broker-dealers incur costs in managing settlement risk with CCPs. Broker-dealers can recover the average cost of risk management from their customers. However, if a particular trade has above-average settlement risk, such as when market prices are unusually volatile, it is difficult for broker-dealers to pass along these higher costs to their customers because fees typically depend on factors other than those such as market volatility that impact settlement risk. In extreme cases broker-dealers may prevent a customer from trading.[337] Shortening the settlement cycle reduces the cost of risk management and should reduce any such incentives to trade more than they otherwise would if they bore the full cost of settlement risk for their trades.

The benefits of harmonized settlement cycles may also accrue to mutual funds. As described above,[338] transactions in mutual fund shares typically settle on a T+1 basis even when transactions in their portfolio securities settle on a T+2 basis. As a result, there is a one-day mismatch between when these funds make payments to shareholders that redeem shares and when they receive cash proceeds for portfolio securities they sell. This mismatch represents a source of liquidity risk for mutual funds. Shortening the settlement cycle by one day will mitigate the liquidity risk due to this mismatch. As a result, mutual funds that settle on a T+1 basis may be able to reduce the size of cash reserves or the size of back up credit facilities that some currently use to manage liquidity risk from the mismatch in settlement cycles. Further, mutual funds may be able to invest incoming cash more quickly when funds have net subscriptions, because the settlement time for the purchase of fund shares will be aligned with the settlement time for portfolio investments, thus allowing funds to maximize their exposure to their defined investment strategies.

The Commission preliminarily believes that these benefits are unlikely to be substantially mitigated by the exceptions to Rule 15c6–1(a) discussed in Part III.A. Market participants that rely on Rule 15c6–1(b) in order to transact in limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association would likely continue to rely on the exception if the Commission adopts the proposed amendment to Rule 15c6–1(a). There may be transactions covered by Rule 15c6–1(b) that in the past did not make use of this exception because they settled within two business days, but that may require use of this exception under the proposed amendment to paragraph (a) of the rule because they require more than one business day to settle. However, these markets are opaque and the Commission does not have data on transactions in these categories that currently settle within two days but that might make use of this exception under the proposed amendment to Rule 15c6–1(a). In addition, pursuant to Rule 15c6–1(b), the Commission has granted an exemption from Rule 15c6–1 for securities that do not have facilities for transfer or delivery in the U.S.[339] Market participants relying on this exemption are unlikely to be impacted by a shortening of the standard settlement cycle to T+1.

Finally, the extent to which different types of market participants would experience any benefits that stem from the proposed amendment to Rule 15c6–1(a) may depend on their market power. As discussed above,[340] the clearance and settlement system involves a number of intermediaries that provide a range of services between the ultimate buyer and seller of a security. Those market participants that have a greater ability to negotiate with customers or service providers may be able to retain a larger portion of the operational cost savings from a shorter settlement cycle than others, as they may be able to use their market power to avoid passing along the cost savings to their clients.

The Commission also proposes to delete Rule15c6–1(c) that establishes a T+4 settlement cycle for firm commitment offerings for securities that are priced after 4:30 p.m. ET, unless otherwise expressly agreed to by the parties at the time of the transaction.[341] As discussed above, paragraph (c) is rarely used in the current T+2 settlement environment, but the IWG expects a T+1 standard settlement cycle would increase reliance on paragraph

[333] *See supra* Part V.B (further discussing financial resources collected to mitigate and manage financial risks).

[334] *See* BCG Study, *supra* note 22, at 10. According to SIFMA, average daily trading volume in U.S. equities grew from $253.1B in 2011 to $564.7B in 2021, an increase of 123%. *See* CBOE Exchange, Inc., and SIFMA, US Equities and Related Statistics (Jan. 3, 2022), *https://www.sifma.org/resources/research/us-equity-and-related-securities-statistics/us-equities-and-related-statistics-sifma/*. Price volatility, as measured by the standard deviation of the price, is concave in time, which means that as a period of time increases, volatility will increase, but at a decreasing rate. This suggests that the reduction in price volatility from moving from T+2 settlement to T+1 settlement is larger than the reduction in price volatility from moving from T+3 settlement to T+2 settlement. These two facts suggest that the estimated reduction in clearing fund contributions would be more than $25 million per year.

[335] *See* Peter F. Christoffersen & Francis X. Diebold, *How Relevant is Volatility Forecasting for Financial Risk Management?,* 82 Rev. Econ. & Stat. 12 (2000), *http://www.mitpressjournals.org/doi/abs/10.1162/003465300558597#.V6xeL_nR-JA*. The paper shows that volatility can be predicted in the short run, and concludes that short run forecastable volatility would be useful for risk management practices.

[336] *See* Sam Schulhofer-Wohl, *Externalities in securities clearing and settlement: Should securities CCPs clear trades for everyone?* (Fed. Res. Bank Chi. Working Paper No. 2021–02, 2021).

[337] This occurred in January 2021 following heightened interest in certain ''meme'' stocks. *See supra* Part II.A; *see also* Staff Report on Equity and Options Market Structure Conditions in Early 2021, at 31–35 (Oct. 14, 2021), *https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf*.

[338] *See supra* note 332; *see also supra* Part V.B.3.

[339] *See supra* note 90 and accompanying text.

[340] *See supra* Part II.B.

[341] *See supra* Part III.A.3.

(c).[342] The Commission preliminarily believes that establishing T+1 as the standard settlement cycle for these firm commitment offerings, and thereby aligning the settlement cycle with the standard settlement cycle for securities generally, would reduce exposures of underwriters, dealers, and investors to credit and market risk, and better ensure that the primary issuance of securities is available to settle secondary market trading in such securities. The Commission believes that harmonizing the settlement cycle for such firm commitment offerings with secondary market trading, to the greatest extent possible, limits the potential for operational risk. Further, should there be a need to settle beyond T+1, perhaps because of complex documentation requirements of certain types of offerings, the parties to the transaction can agree to a longer settlement period pursuant to paragraph (d) when they enter the transaction.

In addition to the amendment to Rule 15c6–1(a) and proposed deletion of Rule 15c6–1(c), the Commission proposes three additional rules applicable, respectively, to broker-dealers, investment advisers, and CMSPs to improve the efficiency of managing the processing of institutional trades under the shortened timeframes that would be available in a T+1 environment. First, the Commission proposes new Rule 15c6–2 to require that a broker-dealer enter into contracts with institutional customers that can achieve the allocation, confirmation, and affirmation of a securities transaction no later than the end of trade date.[343]

The Commission preliminarily believes that implementing a T+1 standard settlement cycle, as well as any potential further shortening beyond T+1, will necessitate significant increases in same-day affirmation rates because timely affirmations will be critical to achieving timely settlement. In this way, the Commission also preliminarily believes that proposed Rule 15c6–2 should facilitate timely settlement as a general matter because it will accelerate the transmission and affirmation of trade data to trade date, improving the accuracy and efficiency of institutional trade processing and reducing the potential for settlement failures. The Commission further anticipates that proposed Rule 15c6–2 would likely encourage further development of automated and standardized practices among market participants more generally, particularly those that continue to rely on manual processes to achieve settlement.

Although same-day affirmation is considered a best practice for institutional trade processing, adoption is not universal across market participants or even across all trades entered by a given participant. Market participants continue to use hundreds of ''local'' matching platforms, and rely on inconsistent SSI data independently maintained by broker-dealers, investment managers, custodians, sub-custodians, and agents on separate databases. As discussed in Part II.B, processing institutional trades requires managing the back and forth involved with transmitting and reconciling trade information among the parties, functionally matching and re-matching with the counterparties to the trade, as well as custodians and agents, to facilitate settlement. It also requires market participants to engage in allocation processes, such as allocation-level cancellations and corrections, some of which are still processed manually.[344] This collection of redundant, often manual steps and the use of uncoordinated (*i.e.,* not standardized) databases can lead to delays, exceptions processing, settlement fails, wasted resources, and economic losses. The total industry headcount employed in managing today's pre-settlement and settlement fails management process is in the thousands, and additional costs and risks resulting from the inability to settle efficiently are significant.[345] The Commission believes that proposed Rule 15c6–2 should increase the percentage of trades that achieve an affirmed confirmation on trade date and should help facilitate an orderly transition to T+1. Proposed Rule 15c6–2 would also improve the efficiency of the settlement cycle by incentivizing market participants to commit to operational and technological upgrades that facilitate same-day affirmation to eliminate, among other things, manual operations, while also reducing operational risk and promoting readiness for shortening the settlement cycle.

Second, the Commission proposes to amend the recordkeeping obligations of investment advisers to ensure that they are properly documenting their related allocations and affirmations, as well as the confirmations they receive from their broker-dealers.[346] The proposed amendment to Rule 204–2 would require advisers to time and date stamp records of any allocation and each affirmation. The Commission believes that the timing of communicating allocations to the broker or dealer is a critical pre-requisite to ensure that confirmations can be issued in a timely manner, and affirmation is the final step necessary for an adviser to acknowledge agreement on the terms of the trade or alert the broker or dealer of a discrepancy. The Commission believes the proposed recordkeeping requirements would help advisers to establish that they have met their obligations to achieve a matched trade.

Finally, the Commission proposes a requirement for CMSPs to establish, implement, maintain, and enforce written policies and procedures designed to facilitate straight-through processing.[347] Under the rule, a CMSP facilitates straight-through processing when its policies and procedures enable its users to minimize, to the greatest extent that is technologically practicable, the need for manual input of trade details or manual intervention to resolve errors and exceptions that can prevent settlement of the trade.[348]

The Commission believes that increasing the efficiency of using a CMSP can reduce costs and risks associated with processing institutional trades and improve the efficiency of the National C&S System. CMSPs have become increasingly connected to a wide variety of market participants in the U.S.,[349] increasing the need to reduce risks and inefficiencies that may result from use of a CMSPs' systems. Because the proposed rule would preclude reliance on service offerings at CMSPs that rely on manual processing, the Commission preliminarily believes the proposed rule will better position CMSPs to provide services that not only reduce risk generally but also help facilitate an orderly transition to a T+1 standard settlement cycle, as well as potential further shortening of the settlement cycle in the future. The proposed requirement would support the benefits derived from a shortening of the settlement cycle and would mitigate any subsequent potential increase in fails due to the reduced time to remediate any errors in trades.

Proposed Rule 17Ad–27 also would require a CMSP to submit every twelve months to the Commission a report that describes the following: (i) The CMSP's current policies and procedures for facilitating straight-through processing;

[342] T+1 Report, *supra* note 18, at 33–35.

[343] *See supra* Part III.B.1.

[344] *See supra* note 168.

[345] *See* DTCC Modernizing Paper, *supra* note 59.

[346] *See supra* Part III.C.

[347] *See supra* Part III.D; *see also supra* Part III.D.1 (further discussing the term ''straight-through processing'').

[348] *See supra* note 347.

[349] *See supra* note 185.

(ii) its progress in facilitating straight-through processing during the twelve month period covered by the report; and (iii) the steps the CMSP intends to take to facilitate and promote straight-through processing during the twelve month period that follows the period covered by the report.[350] The proposed requirement would also inform the Commission and the public, particularly the direct and indirect users of the CMSP, as to the progress being made each year to advance implementation of straight-through processing with respect to the allocation, confirmation, affirmation, and matching of institutional trades, the communication of messages among the parties to the transactions, and the availability of service offerings that reduce or eliminate the need for manual processing.

Proposed Rule 17Ad–27 would require the CMSP to file the report on EDGAR using Inline XBRL, a structured (machine-readable) data language. Requiring a centralized filing location and a machine-readable data language for the reports would facilitate access, retrieval, analysis, and comparison of the disclosed straight-through processing information across different CMSPs and time periods by the Commission and the public, thus potentially augmenting the informational benefits of the report requirement.

2. Costs

The Commission preliminarily believes that compliance with a T+1 standard settlement cycle would involve initial fixed costs to update systems and processes.[351] The Commission does not have all of the data necessary to form its own firm-level estimates of the costs of updates to systems and processes, as the types of data needed to form these estimates are difficult or impossible for the Commission to collect. However, the Commission has used inputs provided by industry studies discussed in this release to quantify these costs to the extent possible in Part V.C.5. In addition, the Commission encourages commenters to provide any information or data on the costs to market participants of the proposed rule.

The operational cost burdens associated with the proposed amendment to Rule 15c6–1(a) for different market participants might vary depending on each market participant's degree of direct or indirect inter-connectivity to the clearance and settlement process, regardless of size. For example, market participants that internally manage more of their own post-trade processes would directly incur more of the upfront operational costs associated with the proposed amendment to Rule 15c6–1(a), because they would be required to directly undertake more of the upgrades and testing necessary for a T+1 standard settlement cycle. As mentioned in Part II.B, other market participants might outsource the clearance and settlement of their transactions to third-party providers of back-office services. The exposures to the operational costs associated with shortening the standard settlement cycle would be indirect to the extent that third-party service providers pass through the costs of infrastructure upgrades to their customers. The degree to which customers bear operational costs depends on their bargaining position relative to third-party providers. Large customers with market power may be able to avoid internalizing these costs, while small customers in a weaker negotiation position relative to service providers may bear the bulk of these costs.

Further, changes to initial and ongoing operational costs may make some self-clearing market participants alter their decision to continue internally managing the clearance and settlement of their transactions. Entities that currently internally manage their clearance and settlement activity may prefer to restructure their businesses to rely instead on third-party providers of clearance and settlement services that may be able to amortize the initial fixed cost of upgrade across a much larger volume of transaction activity.

In addition, the shortening of the settlement cycle may increase the need for some market participants engaging in cross-border and cross-asset transactions to hedge risks stemming from mismatched settlement cycles, resulting in additional costs. For example, under the proposed T+1 settlement cycle, a market participant selling a security in European equity markets to fund a purchase of securities in U.S. markets would face a one day lag between settlement in Europe and settlement in the U.S. The market participant could choose between bearing an additional day of market risk in the U.S. trading markets by delaying the purchase by a day, or funding the purchase of U.S. shares with short-term borrowing. Additionally, because the FX market has a T+2 settlement cycle,[352] the market participant would also be faced with a choice between bearing an additional day of currency risk due to the need to sell Euros as part of the transaction, or to incur the cost related to hedging away this risk in the forward or futures market.

The way that different market participants would likely bear costs as a result of the proposed amendment to Rule 15c6–1(a) may also vary based on their business structure. For example, a shorter standard settlement cycle will require payment for securities that settle regular-way by T+1 rather than T+2. Generally, regardless of current funding arrangements between investors and broker-dealers, removing one business day between execution and settlement would mean that broker-dealers could choose between requiring investors to fund the purchase of securities one business day earlier while extending the same level of credit they do under T+2 settlement, or providing an additional business day of funding to investors. In other words, broker-dealers could pass through some of the costs of a shorter standard settlement cycle by imposing the same shorter cycle on investors, or they could pass these costs on to investors by raising transactions fees to compensate for the additional business day of funding the broker-dealer may choose to provide. The extent to which these costs get passed through to customers may depend on, among other things, the market power of the broker-dealer. If a broker-dealer does not face significant competition, its market power may enable it to recover the entire initial investment cost from its customers. On the other hand, a broker-dealer that faces perfect competition for its customers may be unable to pass along any of these costs to its customers.[353]

However, broker-dealers that predominantly serve retail investors may experience the burden of an earlier payment requirement differently from broker-dealers with more institutional

[350] *See supra* Part III.D.2.

[351] Industry sources have suggested some updates to systems and processes might yield operational cost savings after the initial update. *E.g.,* ''While there may be . . . up-front implementation costs to transition the industry to T+1, the industry foresees long-term cost reduction for market participants, and by extension, costs borne by end investors, given the benefits of moving to T+1 settlement.'' T+1 Report, *supra* note 18, at 9; *see infra* Part V.C.5.a) for industry estimates of the costs and benefits of the proposed amendment to Rule 15c6–1(a).

[352] *See, e.g.,* CME Rulebook, Ch. 13, § 1302 ('''Spot FX Transaction''' means a currency purchase and sale that is bilaterally settled by the counterparties via an actual delivery of the relevant currencies within two Business Days.''), *https://www.cmegroup.com/rulebook/CME/.* U.S. and Canadian dollar spot FX transactions settle on the next business day. *Id.* Ch. 13, Appendix.

[353] *See supra* Part V.C.1 for additional discussion regarding the impact of broker-dealer market power. *See infra* Part V.C.5.b)(3) for quantitative estimates of the costs to broker-dealers.

clients or large custodian banks because of the way retail investors fund their accounts. Retail investors may find it difficult to accelerate payments associated with their transactions, which may cause broker-dealers who are unwilling to extend additional credit to retail investors to instead require that these investors pre-fund their transactions.[354] These broker-dealers may also experience costs unrelated to funding choices. For instance, retail investors may require additional or different services such as education regarding the impact of the shorter standard settlement cycle.

Finally, a shorter settlement cycle may result in higher costs associated with liquidating a defaulting member's position, as a shorter horizon may result in larger price impacts, particularly for less liquid assets. For example, when a clearing member defaults, NSCC is obligated to fulfill its trade guarantee with the defaulting member's counterparty. One way it accomplishes this is by liquidating assets from clearing fund contributions from clearing members. However, liquidating assets in shorter periods of time can have larger adverse impacts on the prices of the assets. Shortening the standard settlement cycle from two business days to one business day could reduce the amount of time that NSCC would have to liquidate its assets, which may exacerbate the price impact of liquidation.

3. Economic Implications Through Other Commission Rules

As noted in Part III.E, the proposed amendment to Rule 15c6–1(a), by shortening the standard settlement cycle, could have an ancillary impact on the means by which market participants comply with existing regulatory obligations that relate to the settlement timeframe. The Commission also provided illustrative examples of specific Commission rules that include such requirements or are otherwise are keyed-off settlement date, including Regulation SHO,[355] and certain provisions included in the Commission's financial responsibility rules.[356] [357]

Financial markets and regulatory requirements have evolved significantly since the Commission adopted Rule 15c6–1 in 1993. Market participants have responded to these developments in diverse ways, including implementing a variety of systems and processes, some of which may be unique to specific market participants and their businesses, and some of which may be integrated throughout business operations of certain market participants. Because of the broad variety of ways in which market participants currently satisfy regulatory obligations pursuant to Commission rules, in most circumstances it is difficult to identify those practices that market participants would need to change in order to meet these other obligations. Under these circumstances, and without additional information, the Commission is unable to provide an estimate of the ancillary economic impact that the proposed amendment to Rule 15c6–1(a) would have on how market participants comply with other Commission rules. The Commission invites commenters to provide quantitative and qualitative information about these potential economic effects.

In certain cases, based on information about current market practices, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) would be unlikely to change the means by which market participants comply with existing regulatory requirements. In these cases, the Commission believes that market participants would not incur significant increased costs of compliance from such regulatory requirements from shortening the settlement cycle to T+1.

In other cases, however, the proposed amendment may incrementally increase the costs associated with complying with other Commission rules where such rules potentially require broker-dealers to engage in purchases of securities. Two examples of these types of rules are Regulation SHO and the Commission's financial responsibility rules. In most instances, Regulation SHO governs the timeframe in which a ''participant'' of a registered clearing agency must close out a fail to deliver position by purchasing or borrowing securities.[358] Similarly, some of the Commission's financial responsibility rules relate to actions or notifications that reference the settlement date of a transaction. For example, Exchange Act Rule 15c3–3(m) [359] uses the settlement date to prescribe the timeframe in which a broker-dealer must complete certain sell orders on behalf of customers. As noted above, the term ''settlement date'' is also incorporated into paragraph (c)(9) of Rule 15c3–1,[360] which explains what it means to ''promptly transmit'' funds and ''promptly deliver'' securities within the meaning of paragraphs (a)(2)(i) and (a)(2)(v) of Rule 15c3–1. As explained above, the concepts of promptly transmitting funds and promptly delivering securities are incorporated in other provisions of the financial responsibility rules.[361] Under the proposed amendment to Rule 15c6–1(a), the timeframes included in these rules will be one business day closer to the trade date.

The Commission preliminarily believes that shortening these timeframes would not materially affect the costs that broker-dealers would likely incur to meet their Regulation SHO obligations and obligations under the Commission's financial responsibility rules. Nevertheless, the Commission acknowledges that a shorter settlement cycle could affect the processes by which broker-dealers manage the likelihood of incurring these obligations. For example, broker-dealers may currently have in place inventory management systems that help them avoid failing to deliver securities by T+2. Broker-dealers would likely incur costs in order to update these systems to support a shorter settlement cycle.

In cases where market participants will need to adjust the way in which they comply with other Commission rules, the magnitude of the costs associated with these adjustments is difficult to quantify. As noted above, market participants employ a wide variety of strategies to meet regulatory obligations. For example, broker-dealers may ensure that they have securities available to meet their obligations by using inventory management systems or they may choose instead to borrow securities. An estimate of costs is further complicated by the possibility that market participants could change their compliance strategies in response to a shorter standard settlement cycle.

As with the T+2 transition, the Commission anticipates that the proposed transition to T+1 would again require changes to SRO rules and changes to the operations or market participants subject to those rules to achieve consistency with a T+1 standard settlement cycle. Certain SRO

[354] *See infra* Part V.C.5.b)(3) for additional discussion regarding retail investors and their broker-dealers.

[355] 17 CFR 242.200 *et seq.*

[356] *See supra* Part III.E.2.

[357] The Commission is also soliciting comment on the impact of shortening the settlement cycle on compliance with Rule 10b–10 under the Exchange Act and broker-dealer obligations with regard to prospectus delivery. *See supra* Parts III.E.3 and III.E.4. However, based on current practices and comments received by the Commission to the T+2 proposing release, the Commission preliminarily believes shortening the settlement cycle to T+1 will not impact compliance with these rules. *Id.*

[358] *See supra* Part III.E.1.

[359] 17 CFR 240.15c3–3(m).

[360] 17 CFR 240.15c3–1(c)(9).

[361] *See, e.g.,* 17 CFR 240.15c3–1(a)(2)(i), (a)(2)(v); 17 CFR 240.15c3–3(k)(1)(iii), (k)(2)(i), (k)(2)(ii); 17 CFR 240.17a–5(e)(1)(A); 17 CFR 240.17a–13(a)(3).

rules reference existing Rule 15c6–1 or currently define ''regular way'' settlement as occurring on T+2 and, as such, may need to be amended in connection with shortening the standard settlement cycle to T+1. Certain timeframes or deadlines in SRO rules also may refer to the settlement date, either expressly or indirectly. In such cases, the SROs may need to amend these rules in connection with shortening the settlement cycle to T+1.[362]

The Commission invites commenters to provide quantitative and qualitative information about the impact of the proposed amendment to Rule 15c6–1(a) on the costs associated with compliance with other Commission rules.

4. Effect on Efficiency, Competition, and Capital Formation

Market participants may incur initial costs for the investments necessary to comply with a shorter standard settlement cycle.[363] However, these costs would likely differ across market participants and these differences may exacerbate coordination problems. First, per-transaction operational costs clearing members incur in connection with the clearing services they provide may be higher for members that clear fewer transactions than such costs are for members that clear a higher volume of transactions. Thus, the extent to which many of the upgrades necessary for a T+1 standard settlement cycle are optimal for a member to adopt unilaterally may depend, in part, on the transaction volume cleared by such member. For example, certain upgrades necessary for a T+1 standard settlement cycle may result in economies of scale, where large clearing members are able to comply with the proposed amendment to Rule 15c6–1(a) at a lower per-transaction cost than smaller members. As a result, larger members might take a short time to recover their initial costs for upgrades; smaller members with lower transaction volumes might take longer to recover their initial cost outlays and might be more reluctant to make the upgrades in the absence of the proposed amendment. These differences in cost per transaction may be mitigated through the use of third-party service providers.

In addition, the Commission acknowledges that the upgrades necessary to implement a shorter standard settlement cycle may produce indirect economic effects. We analyze some of these indirect effects, such as the impact on competition and third-party service providers, in the following section.

A shorter settlement cycle might improve the efficiency of the clearance and settlement process through several channels. First, the Commission preliminarily believes that the primary effect that a shorter settlement cycle would have on the efficiency of the settlement process would be a reduction in the credit, market, and liquidity risks that broker-dealers, CCPs, and other market participants are subject to during the standard settlement cycle.[364] A shorter standard settlement cycle will generally reduce the volume of unsettled transactions that could potentially pose settlement risk to counterparties. Shortening the period between trade execution and settlement would enable trades to be settled with less aggregate risk to counterparties or the CCP. A shorter standard settlement cycle may also decrease liquidity risk by enabling market participants to access the proceeds of their transactions sooner, which may reduce the cost market participants incur to handle idiosyncratic liquidity shocks (*i.e.,* liquidity shocks that are uncorrelated with the market). That is, because the time interval between a purchase/sale of securities and payment is reduced by one business day, market participants with immediate payment obligations that they could cover by selling securities would be required to obtain short-term funding for one less day.[365] As a result of reduced cost associated with covering their liquidity needs, market participants may, under particular circumstances, be able to shift assets that would otherwise be held as liquid collateral towards more productive uses, improving allocative efficiency.[366]

Second, a shorter standard settlement cycle may increase price efficiency through its effect on credit risk exposures between financial intermediaries and their customers. In particular, a prior study noted that certain intermediaries that transact on behalf of investors, such as broker-dealers, may be exposed to the risk that their customers default on payment obligations when the price of purchased securities declines during the settlement cycle.[367] As a result of the option to default on payment obligations, customers' payoffs from securities purchases resemble European call options and, from a theoretical standpoint, can be valued as such. Notably, the value of European call options increases in the time to expiration[368] suggesting that the value of call options held by customers who purchase securities is increasing in the length of the settlement cycle. In order to compensate itself for the call option that it writes, an intermediary may include the cost of these call options as part of its transaction fee and this cost may become a component of bid-ask spreads for securities transactions. By reducing the value of customers' option to default by reducing the option's time to maturity, a shorter standard settlement cycle may reduce transaction costs in U.S. securities markets. In addition, to the extent that any benefit buyers receive from deferring payment during the settlement cycle is incorporated in securities returns,[369] the proposed amendment to Rule 15c6–1(a) may reduce the extent to which such returns deviate from returns consistent with changes in fundamentals.

As discussed in more detail above, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) would likely require market participants to incur costs related to infrastructure upgrades and would likely yield benefits to market participants, largely in the form of reduced financial risks related to settlement. As a result, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) could affect competition in a number of different, and potentially offsetting, ways.

The prospective reduction in financial risks related to shortening the standard settlement cycle may represent a reduction in barriers to entry for certain market participants.[370] Reductions in the financial resources required to cover an NSCC member's clearing fund requirements that result from a shorter standard settlement cycle could encourage financial firms that currently clear transactions through NSCC clearing members to become clearing members themselves.

[362] The T+1 Report similarly indicates that SROs will likely need to update their rules to facilitate a transition to a T+1 standard settlement cycle. T+1 Report, *supra* note 18, at 35.

[363] *See supra* Part V.C.2.

[364] Reduction of these risks should result in the reduction of margin requirements and other risk management activity that requires resources that could be put to another use.

[365] *See supra* Part V.B.2.

[366] *See supra* Part V.A.

[367] *See* Madhavan et al., *supra* note 296.

[368] All other things equal, an option with a longer time to maturity is more likely to be in the money given that the variance of the underlying security's price at the exercise date is higher.

[369] *See supra* Part V.B.2.

[370] *See supra* Part V.C.1 for a discussion of the reduction in credit, market, and liquidity risks to which NSCC would be subject as a result of a shortening of the settlement cycle and the subsequent reduction financial resources dedicated to mitigating those risks.

Their entry into the market could promote competition among NSCC clearing members. Furthermore, if a reduction in settlement risks results in lower transaction costs for the reasons discussed above, market participants that were, on the margin, discouraged from supplying liquidity to securities markets due to these costs could choose to enter the market for liquidity suppliers, increasing competition.

At the same time, the Commission acknowledges that the process improvements required to enable a shorter standard settlement cycle could adversely affect competition. Among clearing members, where such process improvements might be necessary to comply with the shorter standard settlement cycle required under the proposed amendment to Rule 15c6–1(a), the cost associated with compliance might increase barriers to entry, because new firms would incur higher fixed costs associated with a shorter standard settlement cycle if they wish to enter the market. Clearing members might choose to comply by upgrading their systems and processes or may choose instead to exit the market for clearing services. The exit of clearing members could have negative consequences for competition among clearing members. Clearing activity tends to be concentrated among larger broker-dealers.[371] Clearing member exit could result in further concentration and additional market power for those clearing members that remain.

Alternatively, some current clearing members may choose to comply in part by outsourcing their operational needs to third-party service providers. Use of third-party service providers may represent a reasonable response to the operational costs associated with the proposed amendment to Rule 15c6–1(a). To the extent that third-party service providers are able to spread the fixed costs of compliance across a larger volume of transactions than their clients, the Commission preliminarily believes that the use of third-party service providers might impose a smaller compliance cost on clearing members than if these firms directly bore the costs of compliance. The Commission preliminarily believes that this impact may stretch beyond just clearing members. The use of third-party service providers may mitigate the extent to which the proposed amendment to Rule 15c6–1(a) raises barriers to entry for broker-dealers. Because these barriers to entry may have adverse effects on competition between clearing members, we preliminarily believe that the use of third-party service providers may mitigate the adverse effects of the proposed amendment to Rule 15c6–1(a) on competition between broker-dealers.

Existing market power may also affect the distribution of competitive impacts stemming from the proposed amendment to Rule 15c6–1(a) across different types of market participants. While, as noted above, reductions in the credit, market, and liquidity risks that broker-dealers, CCPs, and other market participants are subject to during the standard settlement cycle could promote competition among clearing members and liquidity suppliers, these groups may benefit to differing degrees, depending on the extent to which they are able to capture the benefits of a shortened standard settlement cycle.

Finally, a shorter standard settlement cycle might also improve the capital efficiency of the clearance and settlement process, which would promote capital formation in U.S. securities markets and in the financial system generally.[372] A shorter standard settlement cycle would reduce the amount of time that collateral must be held for a given trade, thus freeing the collateral to be used elsewhere earlier. For a given quantity of trading activity, collateral would also be committed to clearing fund deposits for a shorter period of time. The greater collateral efficiency promoted by a shorter settlement cycle might also indirectly promote capital formation for market participants in the financial system in general. Specifically, the improved capital efficiency that would result from a shorter standard settlement cycle would enable a given amount of collateral to support a larger amount of financial activity.

5. Quantification of Direct and Indirect Effects of a T+1 Settlement Cycle

In previous years, several industry groups have released estimates for compliance costs associated with a shorter standard settlement cycle, including the SIA, the ISC, and BCG.[373] Although all of these studies examined prior shortenings of the settlement cycle including from T+5 to T+3 and from T+3 to T+2, in the absence of a current study examining shortening from the current T+2 to T+1 they serve as a useful rough initial estimate of the costs involved in a settlement cycle shortening. The most recent of these, the BCG Study performed a cost-benefit analysis of a T+2 standard settlement cycle. Below is a summary of the cost estimates in the BCG Study and in the following subsections, an evaluation of these estimates as part of the discussion of the potential direct and indirect compliance costs related to the proposed amendment to Rule 15c6–1(a). In addition, the Commission encourages commenters to provide additional information to help quantify the economic effects that we are currently unable to quantify due to data limitations.

(a) Industry Estimates of Costs and Benefits

The BCG Study concluded that the transition to a T+2 settlement cycle would cost approximately $550 million in incremental initial investments across industry constituent groups,[374] which would result in annual operating savings of $170 million and $25 million in annual return on reinvested capital from clearing fund reductions.[375]

The BCG Study also estimated that the average level of required investments per firm could range from $1 to 5 million, with large institutional broker-dealers incurring the largest amount of investments on a per-firm basis, and buy side firms at the lower end of the spectrum.[376] The investment costs for ''other'' entities, including DTCC, DTCC ITP Matching (US) LLC (f/k/a Omgeo Matching (US) LLC), service bureaus, RICs and non-self-clearing broker-dealers totaled $70 million for the entire group. Within this $70 million, DTCC and Omgeo were estimated to have a compliance investment cost of $10 million each. The study's authors estimated that institutional broker-dealers would have operational cost savings of approximately 5%, retail broker-dealers of 2% to 4%, buy-side firms of 2% and custodial banks of 10% to 15% for an industry total operational cost savings of approximately $170MM per year.[377]

The BCG Study also estimated the annual clearing fund reductions resulting from reductions in clearing firms' clearing funds requirements to be

[371] *See supra* Part V.B.2.

[372] *See supra* Part V.A for more discussion regarding capital formation and efficiency.

[373] *See* SIA Business Case Report, *supra* note 21; *see also* ISG White Paper, *supra* note 26; BCG Study, *supra* note 22. The SIA has since merged with other groups to form SIFMA.

[374] The BCG Study generally refers to ''institutional broker-dealers,'' ''retail broker-dealers,'' ''buy side'' firms, and ''custodian banks,'' without defining these particular groups. The Commission uses these terms when referring to estimates provided by the BCG Study but notes that its own definitions of various affected parties may differ from those in the BCG Study.

[375] *See* BCG Study, *supra* note 22, at 9–10.

[376] *Id.* at 30–31.

[377] *See id.* at 41.

$25 million per year.[378] The study estimated this by considering the reduction in clearing fund requirements and multiplied it by the average Federal Funds target rate for the 10-year period up until 2008 (3.5%). The BCG Study also estimated the value of the risk reduction in buy side exposure to the sell side. The implied savings were estimated to be $200 million per year, but these values were not included in the overall cost-benefit calculations.

Several factors limit the usefulness of the BCG Study's estimates of potential costs and benefits of the proposed amendment to Rule 15c6–1(a). First, a further shortening of the settlement cycle to T+1 may require investments in new technology and processes that were not necessary under the previous shortening to T+2. Second, technological improvements, such as the increased use of computers and automation in post-trade processes, that have been made since 2012, when the report was first published, may have reduced the cost of the upgrades necessary to comply with a shorter settlement cycle. This may, in turn, reduce the costs associated with the proposed amendment,[379] as a larger portion of market participants may have already adopted many processes that would reduce the cost of a transition to a shorter settlement cycle. In addition, the BCG Study considered as a part of its cost estimates operational cost savings as a result of improvements to operational efficiency.

Lastly, the BCG Study was premised on survey responses by a subset of market participants that may be affected by the rule. Surveys were sent to 270 market participants and 70 responses were received, including 20 institutional broker-dealers, prime brokers and correspondent clearers; 12 retail broker-dealers; 17 buy side firms; 14 RIAs; and seven custodian banks. Given the low response rate, as well as the uncertainty regarding the sample of market participants that was asked to complete the survey, the Commission cannot conclude that the cost estimates in the BCG Study are representative of the costs of all market participants.[380]

(b) Estimates of Costs

The proposed amendment to Rule 15c6–1(a) would generate direct and indirect costs for market participants, who may need to modify and/or replace multiple systems and processes to comply with a T+1 standard settlement cycle. As noted above, the T+2 Playbook included a timeline with milestones and dependencies necessary for a transition to a T+2 settlement cycle, as well as activities that market participants should consider in preparation for the transition and the Commission preliminarily believes that this provides an initial guide to those that would be necessary for a transition to T+1. The Commission preliminarily believes that the majority of activities for migration to a T+1 settlement cycle would stem from behavior modification of market participants and systems testing, and thus the majority of the costs of migration would be from labor.[381] These modifications would include a compression of the settlement timeline, as well as an increase in the fees that brokers may impose on their customers for trade failures. Although the T+2 Playbook did not include any direct estimates of the compliance costs for a T+2 settlement cycle, the Commission utilizes the timeline in the T+2 Playbook for specific actions necessary to migrate to a T+2 settlement cycle to directly estimate the inputs needed for migration, and form preliminary compliance cost estimates for the shortening to T+2 and uses these as an estimate for the shortening to T+1.

In addition, the T+2 Playbook, the ISC White Paper, and the BCG Study identified several categories of actions that market participants might need to take to comply with a T+2 settlement cycle and likely also with a T+1 settlement cycle—processing, asset servicing, and documentation.[382] While the following cost estimates for these remedial activities span industry-wide requirements for a migration to a T+1 settlement cycle, the Commission does not anticipate each market participant directly undertaking all of these activities for several reasons. First, some market participants work with third-party service providers to facilitate certain functions that may be impacted by a shorter standard settlement cycle, such as trade processing and asset servicing, and thus may only bear the costs of the requirements through fees paid to those service providers. Second, certain costs might only fall on specific categories of entities. For example, the costs of updating the CNS and ID Net system would only directly fall on NSCC, DTC, and members/participants of those clearing agencies. Finally, some market participants may already have the processes and systems in place to accommodate a T+1 standard settlement cycle or would be able to adjust to a T+1 settlement cycle without incurring significant costs. For example, some market participants may already have the systems and processes in place to meet the requirements for same-day trade affirmation and matching consistent with the requirements in proposed Rule 15c6–2.[383] These market participants may thus bear a significantly lower cost to update their trade affirmation systems/processes to settle on a T+1 standard settlement cycle.[384]

The following section examines several categories of market participants and estimate the compliance costs for each category. The Commission's estimate of the number and type of personnel that may be required is based on the scope of activities for a given category of market participant necessary for the market participant to migrate to a T+1 settlement cycle, the market participant's role within the clearance and settlement process, and the amount of testing required to minimize undue disruptions.[385] Hourly salaries for personnel are from SIFMA's Management and Professional Earnings in the Securities Industry 2013.[386] These estimates use the timeline from the T+2 Playbook to determine the length of time personnel would work on the activities necessary to support a T+1 settlement cycle. The timeline provides an indirect method to estimate the inputs necessary to migrate to a T+1 settlement cycle, rather than relying directly on survey response estimates. The Commission acknowledges many entities are already undertaking activities to support a migration to a T+1 settlement cycle in anticipation of

[378] *See supra* note 334 for a discussion of the impact of increases in daily trading volume since the time of the BCG study on this estimate.

[379] *See supra* Part V.A. While market participants may have already made investments consistent with implementing a shorter settlement cycle, the fact that these investments have not resulted in a shorter settlement cycle is consistent with the existence of coordination problems among market participants.

[380] *See* BCG Study, *supra* note 22, at 15.

[381] *See id.*

[382] *See* T+2 Playbook, *supra* note 27, at 11.

[383] *See* BCG Study, *supra* note 22, at 23.

[384] The BCG Study, as it is based on survey responses from market participants, does reflect the heterogeneity of compliance costs for market participants.

[385] For example, FMUs that play a critical role in the clearance and settlement infrastructure would require more testing associated with a T+1 standard settlement cycle than institutional investors.

[386] To monetize the internal costs, the Commission staff used data from SIFMA publications, modified by Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead. *See* SIFMA, Management and Professional Earnings in the Security Industry—2013 (Oct. 7, 2013), *https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/;* SIFMA, Office Salaries in the Securities Industry—2013 (Oct. 7, 2013), *https://www.sifma.org/resources/research/office-salaries-in-the-securities-industry/.* These figures have been adjusted for inflation using data published by the Bureau of Labor Statistics.

the proposed amendment. However, to the extent that the costs of these activities have already been incurred, the Commission considers these costs sunk, and they are not included in the analysis below.

(1) FMUs—CCPs and CSDs

CNS, NSCC/DTC's ID Net service, and other systems would require adjustment to support a T+1 standard settlement cycle. According to the T+2 Playbook and the ISC White Paper, regulation-dependent planning, implementation, testing, and migration activities associated with the transition to a T+2 settlement cycle could last up to five quarters.[387] The Commission preliminarily believes that these activities would impose a one-time compliance cost of $12.6 million[388] for DTC and NSCC each. After this initial compliance cost, the Commission preliminarily expects that both DTCC and NSCC would incur minimal ongoing costs from the transition to a T+1 standard settlement cycle, because the Commission believes that the majority of costs would stem from pre-migration activities, such as implementation, updates to systems and processes, and testing.

(2) Matching/ETC Providers—Exempt Clearing Agencies

Matching/ETC Providers may need to adapt their trade processing systems to comply with a T+1 settlement cycle. This may include actions such as updating reference data, configuring trade match systems, and configuring trade affirmation systems to affirm trades on T+0. Matching/ETC Providers would also need to conduct testing and assess post-migration activities. The Commission preliminarily estimates that these activities would impose a one-time compliance cost of up to $12.6 million[389] for each Matching/ETC Provider. However, the Commission acknowledges that some ETC providers may have a higher cost burden than others based on the volume of transactions that they process. The Commission expects that ETC providers would incur minimal ongoing costs after the initial transition to a T+1 settlement cycle because the Commission preliminarily believes that the majority of the costs of migration to a T+1 settlement cycle entail behavioral changes of market participants and pre-migration testing.

(3) Market Participants—Investors, Broker-Dealers, Investment Advisers, and Bank Custodians

The overall compliance costs that a market participant incurs would depend on the extent to which it is directly involved in functions related to clearance and settlement including trade confirmation/affirmation, asset servicing, and other activities. For example, retail investors may bear few (if any) direct costs in a transition to a T+1 standard settlement cycle, because their respective broker-dealer handles the back-office functions of each transaction. However, as is discussed below, this does not imply that retail investors would not face indirect costs from the transition, such as those passed through from broker-dealers or banks.

Institutional investors may need to configure systems and update reference data, which may also include updates to trade funding and processing mechanisms, to operate in a T+1 environment. The Commission preliminarily estimates that this would require an initial expenditure of $2.67 million per entity.[390] However, these costs may vary depending on the extent to which a particular institutional investor has already automated its processes. The Commission preliminarily expects institutional investors would incur minimal ongoing direct compliance costs after the initial transition to a T+1 standard settlement cycle.

Broker-dealers that serve institutional investors would not only need to configure their trading systems and update reference data, but may also need to update trade confirmation/affirmation systems, documentation, cashiering and asset servicing functions, depending on the roles they assume with respect to their clients. The Commission preliminarily estimates that, on average, each of these broker-dealers would incur an initial compliance cost of $5.44 million.[391] The Commission preliminarily expects that these broker-dealers would incur minimal ongoing direct compliance costs after the initial transition to a T+1 standard settlement cycle.

Broker-dealers that serve retail customers may also need to spend significant resources to educate their clients about the shorter settlement cycle. The Commission preliminarily estimates that these broker-dealers would incur an initial compliance cost of $9.91 million each.[392] However, unlike previously mentioned market participants, the Commission expects that broker-dealers that serve retail investors may face significant one-time compliance costs after the initial transition to T+1. Retail investors may require additional education and customer service, which may impose costs on their broker-dealers. The Commission preliminarily believes that a reasonable upper bound for the costs associated with this requirement is $30,000 per broker-dealer.[393] Assuming all clearing and introducing broker-dealers must educate retail customers, the upper bound for the costs of retail investor education would be approximately $40.6 million.[394]

Custodian banks would need to update their asset servicing functions to comply with a shorter settlement cycle. The Commission preliminarily estimates that custodian banks would incur an initial compliance cost of $1.34

[387] *See* T+2 Playbook, *supra* note 27, at 11.

[388] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity, industry testing, and migration lasting five quarters. The Commission assumes 10 operations specialists (at $149 per hour), 10 programmers (at $295 per hour), and 1 senior operations manager (at $397/hour), working 40 hours per week. (10 × $149 + 10 × $295 + 1 × $397) × 5 × 13 × 40 = $12,575,000.

[389] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, matching, affirmation, testing, and post-migration testing lasting five quarters. The Commission assumes 10 operations specialists (at $149 per hour), 10 programmers (at $295 per hour), and 1 senior operations manager (at $397/hour), working 40 hours per week. (10 × $149 + 10 × $295 + 1 × $397) × 5 × 13 × 40 = $12,575,000.

[390] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, reference data, and testing activity to last four quarters. We assume 2 operations specialists (at $149 per hour), 2 programmers (at $295 per hour), and 1 senior operations manager (at $397 per hour), working 40 hours per week. (2 × $149 + 2 × $195 + 1 × $397) × 4 × 13 × 40 = $2,673,400.

[391] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, reference data, documentation, asset servicing, and testing to last four quarters. We assume 5 operations specialists (at $149 per hour), 5 programmers (at $295 per hour), and 1 senior operations manager (at $397 per hour), working 40 hours per week. (5 × $149 + 5 × $256 + 1 × $345) × 4 × 13 × 40 = $4,721,600.

[392] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, reference data, documentation, asset servicing, customer education and testing to last five quarters. We assume 5 operations specialists (at $149 per hour), 5 programmers (at $295 per hour), 5 trainers (at $239 per hour) and 1 senior operations manager (at $397 per hour), working 40 hours per week. (5 × $149 + 5 × $295 + 5 × $239 + 1 × $397) × 5 × 13 × 40 = $9,914,000.

[393] This estimate is based on the assumption that a broker-dealer chooses to educate customers using a 10-minute video that takes at most $3,000 per minute to produce. *See* Crowdfunding, Exchange Act Release No. 76324 (Oct. 30, 2015), 80 FR 71388, 71529 & n.1683 (Nov. 16, 2015).

[394] Calculated as $30,000 per broker-dealer × (156 broker-dealers reporting as self-clearing + 1,126 broker-dealers reporting as introducing but not self-clearing + 71 broker-dealers reporting as introducing and self-clearing) = $40,590,000.

million,[395] and expects custodian banks to incur minimal ongoing compliance costs after the initial transition because the Commission preliminarily believes that most of the costs would stem from pre-migration updates and testing.

The proposed amendment to Rule 204–2 would require investment advisers to maintain records of allocations (if any), confirmations or affirmations if the adviser is a party to a contract under that rule. Based on Form ADV filings as of December 2020, approximately 13,804 advisers registered with the Commission are required to maintain copies of certain books and records relating to their advisory business.[396] The Commission further estimates that 2,521 registered advisers required to maintain copies of certain books and records relating to their advisory business would not be required to make and keep the proposed required records because they do not have any institutional advisory clients.[397] Therefore, the remaining 11,283 of these advisers would be subject to the related proposed amendment to Rule 204–2 under the Advisers Act, would enter a contract with a broker or dealer under proposed Rule 15c6–2 and therefore be subject to the related proposed recordkeeping amendment.

As discussed above, based on staff experience, the Commission believes that many advisers already have recordkeeping processes in place to retain records of confirmations received, and allocations and affirmations sent to brokers or dealers. The Commission believes these are customary and usual business practices for many advisers, but that some small and mid-size advisers do not currently retain these records. Further, the Commission believes that the vast majority of these books and records are kept in electronic fashion with an ability to capture a date and time stamp, such as in a trade order management or other recordkeeping system, through system logs of file transfers, email archiving or as part of DTC's Institutional Trade Processing services, but that some advisers maintain paper records (*e.g.,* confirmations) and/or communicate allocations by telephone. In addition, as noted in Section III.C, above, we believe that up to 70% of institutional trades are affirmed by custodians, and therefore advisers may not retain or have access to the affirmations these custodians sent to brokers or dealers.[398]

For those advisers maintaining date and time stamped electronic records already, we estimate no incremental compliance costs. We estimate that the proposed amendments to rule 204–2 would result in an initial one-time compliance cost of approximately $30,500 for the small and mid-size advisers [399] that we estimate do not currently maintain these records, which we amortize over three years for an estimated annual cost of approximately $10,167.[400] In addition, we believe that only a small number of advisers, or 1% of advisers that have institutional clients, do not send allocations or affirmations electronically to brokers or dealers (*e.g.,* they communicate them by telephone).[401] We estimate that these advisers will incur initial one-time costs of approximately $16,000 updating their policies and procedures and training their personnel to send these communications through their existing electronic systems, which we amortize over three years for an estimated annual cost of approximately $5,333.[402]

In addition, we estimate that 70% of institutional trades are affirmed by custodians, and therefore advisers may not retain or have access to the affirmations these custodians sent to brokers or dealers. Because we do not know the number of advisers that correlate to these trades, we estimate for purposes of this collection of information that 70% of advisers with institutional clients make institutional trades that are affirmed by custodians. Therefore, we estimate that these advisers would incur initial one-time costs of approximately $1,095,000 to direct their institutional clients' custodians to copy the adviser on any affirmations sent through email, or for the adviser to use its systems to issue affirmations, which we amortize over three years for an estimated annual cost of approximately $365,500.[403]

Proposed Rule 17Ad–27 would require a CMSP to establish, implement, maintain, and enforce written policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for Rules 17Ad–22(d)(8) and 17Ad–22(e)(2),[404] the Commission preliminarily estimates that respondent CMSPs would incur an aggregate one-time cost of approximately $27,000.[405]

The proposed rule would also require ongoing documentation activities with respect to the annual report required to be submitted to the Commission. Based on the similar reporting requirements and the corresponding burden estimates

[395] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for asset servicing and testing to last two quarters. We assume 2 operations specialists (at $149 per hour), 2 programmers (at $295 per hour), and 1 senior operations manager (at $397 per hour), working 40 hours per week. (2 × $149 + 2 × $295 + 1 × $397) × 2 × 13 × 40 = $1,336,700.

[396] *See infra* note 424.

[397] *See id.*

[398] *See* DTCC ITP Forum Remarks, *supra* note 58.

[399] For purposes of the Paperwork Reduction Act, *infra* section VI, we estimated the number of small and mid-sized advisers based on Form ADV Items 2.A.(2) (for mid-sized advisers) and 12 (for small advisers).

[400] The estimate assumes that the proposed amendments to Rule 204–2 would result in an initial increase in the collection of information burden estimate by 2 hours for the small and medium size advisers that have institutional clients that we estimate do not currently maintain these records. We estimate this number of advisers to be approximately 50% of small and medium sized registered investment advisers that have institutional clients, or approximately 220 small and medium size advisers. *See infra* Table 1 (*Summary of burden estimates for the proposed amendment to Rule 204–2*) note 4. The estimated 2 hours per adviser would be an initial burden to update procedures and instruct personnel to retain these records in the advisers' electronic recordkeeping systems, including any confirmations that they may receive in paper format and do not currently retain. We believe that these advisers already have recordkeeping systems to accommodate these records, which would include, at a minimum, spreadsheet formats and email retention systems. As with our estimates relating to the previous amendments to Advisers Act Rule 204–2, the Commission expects that performance of these functions would most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. We assume 20 minutes of a compliance clerk (at $76 per hour) and 100 minutes of a general clerk (at $68 per hour). (1/3 × 76 + 5/3 × 68) × 220 = $30,507.

[401] We estimate that currently registered large advisers that do not currently maintain electronic records, would be part of the estimated 1% of advisers that would incur 2 hours each to comply with the proposed amendment as described above. For new large advisers, we estimate that there would be no incremental cost associated with this proposed amendment, as we believe these advisers would implement electronic systems as part of their initial compliance with Rule 204–2, and that these electronic systems would have an ability to capture a date and time stamp.

[402] We estimate 1% of 11,283 or 113 advisers do not sent allocations or affirmations electronically. We assume, for each adviser, 20 minutes for a compliance clerk (at $76 per hour) and 100 minutes of a general clerk (at $68 per hour). (1/3 × 76 + 5/3 × 68) × 113 = $15,669.

[403] We estimate 70% of 11,283 or 7,898 advisers affirm trades through custodians. We assume, for each advisor, 20 minutes for a compliance clerk (at $76 per hour) and 100 minutes of a general clerk (at $68 per hour). (1/3 × 76 + 5/3 × 68) × 7,898 = $1,095,189.

[404] *See* Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66219, 66260 (Nov. 2, 2012) (''Clearing Agency Standards Adopting Release''); Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70891–92 (Oct. 13, 2016) (''CCA Standards Adopting Release'').

[405] There are currently three CMSPs and the Commission anticipates that one additional entity may seek to become a CMSP in the next three years. The aggregate cost was estimated as follows: (Assistant General Counsel at $602/hour × 8 hours = $4,816) + (Compliance Attorney at $334/hour × 6 hours = $2,004) = $6,820 × 4 CMSPs equals $27,280.

previously made by the Commission for Rule 17Ad–22(e)(23),[406] the Commission preliminarily estimates that the ongoing activities required by proposed Rule 17Ad–27 would impose an aggregate annual cost of this ongoing burden of approximately $44,000.[407]

(4) Indirect Costs

In estimating these implementation costs, the Commission notes that market participants who bear the direct costs of the actions they undertake to comply with the amendment to Rule 15c6–1 may pass these costs on to their customers. For example, retail and institutional investors might not directly bear the cost of all of the necessary upgrades for a T+1 settlement cycle, but might indirectly bear these costs as their broker-dealers might increase their fees to amortize the costs of updates among their customers. The Commission is unable to quantify the overall magnitude of the indirect costs that retail and institutional investors may bear, because such costs would depend on the market power of each broker-dealer, and each broker-dealer's willingness to pass on the costs of migration to a T+1 standard settlement cycle to its customers. However, the Commission preliminarily believes that in situations where broker-dealers have little or no competition, broker-dealers may pass on as much as 100% of their initial costs to their customers. As discussed above, this could be as high as the full amount of the estimated $5.44 million for broker-dealers that serve institutional investors, and $9.91 million for broker-dealers that serve retail investors. However, in situations where broker-dealers face heavy competition for customers, they may bear the full costs of the initial investment, and avoid passing on any portion of these costs to their customers.

As noted in Part V.B.4, the ability of market participants to pass implementation costs on to customers likely depends on their relative bargaining power. For example, CCPs, like many other utilities, exhibit many of the characteristics of natural monopolies and, as a result, may have market power, particularly relative to broker-dealers who submit trades for clearing. This means that CCPs may be able to share implementation costs they directly face related to shortening the settlement cycle with broker-dealers through higher clearing fees. Conversely, to the extent that institutional investors have market power relative to broker-dealers, broker-dealers may not be in a position to impose indirect costs on them.

(5) Industry-Wide Costs

To estimate the aggregate, industry-wide cost of a transition to a T+1 standard settlement cycle, the Commission takes its own per-entity estimates and multiplies them by our estimate of the respective number of entities. The Commission preliminarily estimates that there are 1,229 buy-side firms, 156 self-clearing broker-dealers, and 49 custodian banks.[408] Additionally, while there are three Matching/ETC Providers, the Commission believes that only one of these is currently providing services in the U.S. We estimate there are 1,282 broker-dealers that would incur investor education costs. One way to establish a total industry initial compliance cost estimate would be to multiply each estimated per-entity cost by the respective number of entities and sum these values, which would result in an estimate of $4.97 billion.[409] The Commission, however, preliminarily believes that this estimate is likely to overstate the true initial cost of transition to a T+1 settlement cycle for a number of reasons. First, our per-entity estimates do not account for the heterogeneity in market participant size, which may have a significant impact on the costs that market participants face. While the BCG Study included both estimates of the number of entities in different size categories as well as estimates of costs that an entity in each size category is likely to incur, it did not provide sufficient underlying information to allow the Commission to estimate the relationship between participant size and compliance cost and thus we cannot produce comparable estimates. The Commission solicits comment on the extent to which market participants believe that the compliance costs for proposed Rule 15c6–1(a) would scale with market participant size.

Second, investments by third-party service providers may mean that many of the estimated compliance costs for market participants are duplicated. The BCG Study suggests that ''leverage'' from service providers may yield a savings of $194 million, reducing aggregate costs by approximately 29%.[410] The Commission seeks further comment on the extent to which the efficiencies generated by the investments of service providers might reduce the compliance costs of market participants. Taking into account potential cost reductions due to repurposing existing systems and using service providers as described above, the Commission preliminarily believes that $3.5 billion represents a reasonable range for the total industry initial compliance costs.[411]

In addition to these initial costs, a transition to a shorter settlement cycle may also result in certain ongoing industry-wide costs. Though the Commission preliminarily believes that a move to a shorter settlement cycle would generally bring with it a reduced reliance on manual processing, a shorter settlement cycle may also exacerbate remaining operational risk. This is because a shorter settlement cycle would provide market participants with less time to resolve errors. For example, if there is an entry error in the trade match details sent by either counterparty for a trade, both counterparties would have one extra day to resolve the error under the baseline than in a T+1 environment. For these errors, a shorter settlement cycle

[406] *See* CCA Standards Adopting Release, *supra* note 404, at 70899.

[407] This figure was calculated as follows: [(Compliance Attorney at $397/hour × 24 hours = $9,528) + (Computer Operations Manager at $480/hour × 10 hours = $4,800) = $14,328 × 4 CMSPs = $57,312]. In addition, we estimate that the Inline XBRL requirement would require respondent CMSPs to spend $900 each year to license and renew Inline XBRL compliance software and/or services, and incur 1 internal burden hour to apply and review Inline XBRL tags for the three disclosure requirements on the report, resulting in a total annual aggregate cost of $5,188 [(Compliance Attorney at $397/hour × 1 hour = $397) + $900 in external costs = $1,297 × 4 CMSPs = $5,188]. In addition, respondent CMSPs that do not already have access to EDGAR would be required to file a Form ID so as to obtain the access codes that are required to file or submit a document on EDGAR. We anticipate that each respondent would require 0.15 hours to complete the Form ID, and for purposes of the PRA, that 100% of the burden of preparation for Form ID will be carried by each respondent internally. Because two respondent CMSPs already have access to EDGAR, we anticipate that proposed amendments would result in a one-time nominal increase of 0.30 burden hours for Form ID, which would not meaningfully add to, and would effectively be encompassed by, the existing burden estimates associated with these reports.

[408] The estimate for the number of buy-side firms is based on the Commission's 13(f) holdings information filers with over $1 billion in assets under management, as of December 31, 2020. The estimate for the number of broker-dealers is based on FINRA FOCUS Reports of firms reporting as self-clearing. *See supra* note 312 and accompanying text. The estimate for the number of custodian banks is based on the number of ''settling banks'' listed in DTC's Member Directories, available at *http://www.dtcc.com/client-center/dtc-directories.*

[409] Calculated as 156 broker-dealers (self-clearing) × $9,914,000 + 1,282 broker-dealers (self-clearing and introducing) × $30,000 + 49 custodian banks × $1,337,000 + 1,229 buy-side firms × $2,673,000 + 1 Matching/ETC Providers × $12,575,000 + 2 FMUs × $12,575,000 + (IA costs of 30,500 + 16,000 + 1,095,000) + (CMSP initial costs of $26,000) = $ 4,974,556,500.

[410] *See* BCG Study, *supra* note 22, at 79.

[411] The lower bound of this range is calculated as ($4.97 billion × (1 − 0.29)) = $3.5 billion.

may increase the probability that the error ultimately results in a settlement fail. However, the Commission preliminarily believes that a large variety of operational errors are possible in the clearance and settlement process and some of these errors are likely to be infrequent, the Commission is unable to quantify the impact that a shorter settlement cycle may have on the ongoing industry-wide costs stemming from a potential increase in operational risk.

D. Reasonable Alternatives

1. Amend 15c6–1(c) to T+2

The Commission is proposing to delete Rule 15c6–1(c) that establishes a T+4 settlement cycle for firm commitment offerings for securities that are priced after 4:30 p.m. ET, unless otherwise expressly agreed to by the parties at the time of the transaction.[412] The Commission has considered amending Rule 15c6–1(c) to shorten the settlement cycle for firm commitment offerings to T+2.

The T+1 Report stated that paragraph (c) is rarely used in the current T+2 settlement environment.[413] The Commission adopted paragraph (c) of Rule 15c6–1 in 1995, two years after Rule 15c6–1 was originally adopted.[414] At the time, the rule included a limited exemption from the requirements under paragraph (a) of the rule for the sale for cash pursuant to a firm commitment offering registered under the Securities Act.[415] The exemption for firm commitment offerings was added in response to public comments stating that new issue securities could not settle on T+3 because prospectuses could not be printed prior to the trade date (the date on which the securities are priced).[416]

As discussed further in Part III.E.4, Rule 172 has implemented an ''access equals delivery'' model that permits, with certain exceptions, final prospectus delivery obligations to be satisfied by the filing of a final prospectus with the Commission, rather than delivery of the prospectus to purchasers. As a result of these changes, broker-dealers generally do not require time to print and deliver prospectus—a point originally cited by many commenters in support of adopting paragraph (c).[417]

Although rarely used in the current T+2 settlement environment, the IWG expects a T+1 standard settlement cycle would increase reliance on paragraph (c).[418] The T+1 Report further stated that the IWG recommends retaining paragraph (c) but amending it to establish a standard settlement cycle of T+2 for firm commitment offerings.[419] The T+1 Report cites issues with respect to documentation and other operational elements of equity offerings that may delay settlement to T+2 in a T+1 environment. As the Commission is not currently aware of any specific documentation associated with firm commitment offerings that cannot be completed by T+1, the Commission preliminarily believes that the need to complete possibly complex transaction documentation prior to settlement does not justify proposing a T+2 standard settlement cycle for equity offerings.

In addition, establishing T+1 as the standard settlement cycle for these firm commitment offerings, and thereby aligning the settlement cycle with the standard settlement cycle for securities generally, would reduce exposures of underwriters, dealers, and investors to credit and market risk, and better ensure that the primary issuance of securities is available to settle secondary market trading in such securities. The Commission believes that harmonizing the settlement cycle for such firm commitment offerings with secondary market trading, to the greatest extent possible, limits the potential for operational risk. In addition, if paragraph (c) is removed as proposed, paragraph (d) would continue to provide underwriters and the parties to a transaction the ability to agree, in advance of a particular transaction, to a settlement cycle other than the standard set forth in Rule 15c6–1(a).

Therefore, in the Commission's view, deleting paragraph (c) while retaining paragraph (d) provides sufficient flexibility for market participants to manage the potential need for longer than T+1 settlement on certain firm commitment offerings priced after 4:30 p.m. that may include ''complex'' documentation because paragraph (d) would continue to permit the underwriters and the parties to a transaction to agree, in advance of entering the transaction, whether T+1 settlement or some other settlement timeframe is appropriate for the transaction. In addition, the Commission preliminarily believes that having the underwriters and the parties to the transaction agree in advance of entering the transaction whether to deviate from the standard settlement cycle established in paragraph (a) would promote transparency among the parties, in advance of entering the transaction, as to the length of the time that it takes to complete complex documentation with respect to the transaction.

2. Propose 17Ad–27 To Require Certain Outcomes

The Commission is proposing Rule 17Ad–27 to require a CMSP establish, implement, maintain and enforce policies and procedures to facilitate straight-through processing for transactions involving broker-dealers and their customers.[420] Proposed Rule 17Ad–27 also would require a CMSP to submit every twelve months to the Commission a report that describes the following: (i) The CMSP's current policies and procedures for facilitating straight-through processing; (ii) its progress in facilitating straight-through processing during the twelve month period covered by the report; and (iii) the steps the CMSP intends to take to facilitate and promote straight-through processing during the twelve month period that follows the period covered by the report.

The Commission has taken a ''policies and procedures'' approach in developing the proposed rule because it preliminarily believes such an approach will remain effective over time as CMSPs consider and offer new technologies and operations to improve the settlement of institutional trades. The Commission also believes that improving the CMSPs' systems to facilitate straight-through processing can help market participants consider additional ways to make their own systems more efficient. In addition, a ''policies and procedures'' approach can help ensure that a CMSP considers in a holistic fashion how the obligations it applies to its users will advance the implementation of methodologies, operational capabilities, systems, or services that support straight-through processing.

The Commission has considered as an alternative to the policies and procedures approach in proposed Rule 17Ad–27, proposing a rule to require CMSPs to achieve certain outcomes that

[412] *See supra* Part III.A.3.

[413] T+1 Report, *supra* note 18, at 33–35.

[414] *See* Prospectus Delivery; Securities Transaction Settlement Cycle, Exchange Act Release No. 34–35705 (May 11, 1995), 60 FR 26604 (May 17, 1995) (''1995 Amendments Adopting Release'').

[415] The exemption was limited to sales to an underwriter by an issuer and initial sales by the underwriting syndicate and selling group. Any secondary resales of such securities were to settle on a T+3 settlement cycle. T+3 Adopting Release, *supra* note 9, at 52898.

[416] *Id.*

[417] *Id.* at 32.

[418] T+1 Report, *supra* note 18, at 33–35.

[419] *Id.* at 33.

[420] *See supra* Part III.D (discussing the proposed rule); *see also supra* Part III.D.1 (discussing straight-through processing).

would facilitate straight-through processing. For example, the Commission could propose to require that a CMSP do the following: (i) Enable the users of its service to complete the matching, confirmation, or affirmation of the securities transaction as soon as technologically and operationally practicable and no later than the end of the day on which the transaction was effected by the parties to the transaction; or (ii) forward or otherwise submit the transaction for settlement as soon as technologically and operationally practicable, as if using fully automated systems.

The Commission believes that these requirements would achieve certain discrete objectives with respect to straight-through processing and would promote prompt and accurate clearance and settlement. The Commission believes, however, that the proposed approach requires policies and procedures that include a holistic review and framework for considering how systems and processes facilitate straight-through processing and that can adapt over time to changes in technology and operations, both among and beyond the CMSP's systems.

E. Request for Comment

The Commission solicits comment on the potential economic impact of the proposed amendment to Rule 15c6–1(a), the proposed deletion of Rule 15c6–1(c), proposed new Rule 15c6–2, the proposed amendment to Rule 204–2, and proposed new Rule 17Ad–27. In addition, the Commission solicits comment on related issues that may inform the Commission's views regarding the economic impact of the proposed amendment to Rule 15c6–1(a), the proposed deletion of Rule 15c6–1(c), proposed new Rule 15c6–2, the proposed amendment to Rule 204–2, and proposed new Rule 17Ad–27 as well as alternatives to the proposed amendments, deletion, and new rules. The Commission in particular seeks comment on the following:

144. The Commission invites commenters to provide additional data on the time it takes to complete each step within the current clearance and settlement process. What are current constraints or impediments for each step within the clearance and settlement process that would limit the ability to shorten the settlement cycle from T+2 to T+1? Do these constraints or impediments vary by market participant type?

145. The Commission invites commenters to provide additional data on the expected collateral efficiency gains from a T+1 standard settlement cycle. How would clearing fund deposits change as a result of the proposed amendment? To what extent does this change fully represent the change to the level of risk associated with the settlement cycle for securities transactions?

146. The Commission invites commenters to discuss the impact of a T+1 settlement cycle on broker-dealers and their customers, including custodians who may hold securities on behalf of said customers. What types of adaptations would be necessary to comply with a T+1 settlement cycle, and what are their relative costs and benefits?

147. The Commission invites commenters to provide data regarding the extent to which a broker-dealer engages in ''internalization'' of a transaction on behalf of a customer. How prevalent are internalization practices? How does the volume of internalization compare to the volume of transactions that are submitted for clearing? [421]

148. The Commission invites commenters to discuss the potential impact of a T+1 standard settlement cycle with respect to cross-border and cross-asset class transactions. Would a T+1 standard settlement cycle make any cross-border or cross-asset transactions more or less costly?

149. The Commission invites commenters to discuss the anticipated market changes, if any, if the proposed amendment to Rule 15c6–1(a) were not adopted. Which activities necessary for compliance with a T+1 standard settlement cycle would occur in the absence of the proposed rule amendment and how quickly would they occur?

150. In addition to the prospective impact on costs/burdens, the Commission solicits comments related to the credit, market, liquidity, legal, and operational risks (increase or decrease) associated with shortening the standard settlement cycle to T+1, and in particular, quantification of such risks.

151. Are there types of customers other than institutional customers that would be affected by proposed Rule 15c6–2? If so, please describe what types of customers. Would the rules impose an unanticipated burden on these customers? Please explain.

152. What are the benefits and costs of requiring broker dealers to enter into written agreements with customers engaging in the trade date allocation, confirmation and affirmation process where such agreements require the process to be completed by the end of the day on trade date?

153. What are the relative burdens of proposed Rule 15c6–2 on the different market participants involved in the allocation, confirmation, and affirmation process, particularly smaller market participants?

VI. Paperwork Reduction Act

Two of the rule proposals, proposed Rule 17Ad–27 and the proposed amendment to Rule 204–2(a), contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[422] The Commission is submitting the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. For the proposed amendment to Rule 204–2(a), the title of the information collection is ''Rule 204–2 under the Investment Advisers Act of 1940'' (OMB control number 3235–0278). For proposed Rule 17Ad–27, the title of the information collection is ''Clearing Agency Standards for Operation and Governance'' (OMB Control No. 3235–0695). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

A. Proposed Amendment to Rule 204–2

Under Section 204 of the Advisers Act, investment advisers registered or required to register with the Commission under Section 203 of the Advisers Act must make and keep for prescribed periods such records (as defined in Section 3(a)(37) of the Exchange Act), furnish copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204–2 sets forth the requirements for maintaining and preserving specified books and records. This collection of information is found at 17 CFR 275. 204–2 and is mandatory. The Commission staff uses the collection of information in its regulatory and examination program. Responses to the requirements of the proposed amendment to Rule 204–2 that are provided to the Commission in the context of its regulatory and examination program would be kept confidential subject to the provisions of applicable law.[423]

[421] *See* Part II.B.2 (further discussing internalization by broker-dealers).

[422] *See* 44 U.S.C. 3501 *et seq.*

[423] *See* Section 210(b) of the Advisers Act, 15 U.S.C. 80b–10(b).

The proposed amendment to Rule 204–2 would require advisers to maintain records of certain documents described in proposed Rule 15c6–2 if the adviser is a party to a contract under that rule. Rule 15c6–2 specifically identifies ''allocations, confirmations or affirmations'' as documents that must be completed no later than the end of the day on trade date. The respondents to this collection of information are approximately 13,804 advisers registered with the Commission.[424] The Commission further estimates that 2,521 of these registered advisers would not be required to make and keep the proposed required records because they do not have any institutional advisory clients.[425] Therefore, the remaining 11,283 of these advisers, or 81.74% of the total registered advisers that are subject to Rule 204–2, would enter a contract with a broker or dealer under proposed Rule 15c6–2 and therefore be subject to the related proposed recordkeeping amendment.

As discussed above, based on staff experience, the Commission believes that many advisers already have recordkeeping processes in place to retain records of confirmations received, and allocations and affirmations sent to brokers or dealers.[426] The Commission believes that while these are customary and usual business practices for many advisers, some small and mid-size advisers do not currently retain these records. Further, the Commission believes that the vast majority of these books and records are kept in electronic fashion in a trade order management or other recordkeeping system, through system logs of file transfers, email archiving or as part of DTC's Institutional Trade Processing services, but that some advisers maintain paper records (*e.g.,* confirmations) and/or communicate allocations by telephone. In addition, as noted in Section III.C, above, we believe that up to 70% of institutional trades are affirmed by custodians, and therefore advisers may not retain or have access to the affirmations these custodians sent to brokers or dealers.[427] Also as noted above, based on staff experience, the Commission believes that many advisers send allocations and affirmations electronically to brokers or dealers, and therefore these records are already date and time stamped in many instances. Nevertheless, the proposed amendments would explicitly add a new requirement to date and time stamp allocations and affirmations (but not confirmations), and thus increase this collection of information burden. The Commission estimates that the associated increase in burden would be included in our estimate described in the chart below for advisers that we believe do not electronically send allocations and affirmations to their brokers or dealers.

We describe the estimated burdens associated with the proposed recordkeeping amendment below. These estimated changes from the currently approved burden are due to the estimated increase in the internal hour and internal time cost burden that would be due to the proposed amendment, and the increase in the number of registered investment advisers (an increase of 80 advisers).

TABLE 1—SUMMARY OF BURDEN ESTIMATES FOR THE PROPOSED AMENDMENT TO RULE 204–2

Advisers	Initial internal hour burden	Annual internal hour burden [1]	Wage rate [2]	Internal time cost per year	Annual external cost burden [3]
220 small and mid-size advisers that have institutional clients, that we believe do not currently maintain the proposed records [4].	2 hours per adviser [5].	2 hours, amortized over a 3 year period, for an annual ongoing internal burden of 0.667 hours per year (220 advisers × 0.667 hours each = 146.74 aggregate annual hours).	$69.36 per hour	0.667 hour × $69.36 per hour = $43.60 per adviser per year. $69.36 × 146.74 aggregate hours = $10,159.16 aggregate cost per year.	$0
113 advisers that have institutional clients that staff estimates do not send allocations or affirmations electronically to brokers or dealers (*e.g.,* they communicate them by telephone) [6].	2 hours per adviser [7].	2 hours, amortized over a 3 year period, for an annual ongoing internal burden of 0.667 hours per year (113 advisers × 0.667 hours each = 75.37 aggregate annual hours).	$69.36 per hour	0.667 hour × $69.36 per hour = $43.60 per adviser per year. $69.36 per hour × 75.37 aggregate hours = $5,227.67 aggregate cost per year.	0
7,898 advisers with institutional clients that the staff estimates make institutional trades that are affirmed by custodians, and therefore do not maintain the proposed affirmations [8].	2 hours per adviser [9].	2 hours, amortized over a 3 year period, for an annual ongoing internal burden of 0.667 hours per year (7,898 advisers × 0.667 hours each = 5,267.97 aggregate hours).	$69.36 per hour	0.667 hour × $69.36 per hour = $43.60 per adviser per year. $69.36 per hour × 5,267.97 aggregate hours = $365,386.40 Aggregate cost per year.	0
Total estimated burden per adviser per year resulting from the proposed amendment.		5,490.08 aggregate hours per year,[10] or 0.4 blended hours per year per adviser [11].	$380,791.95 per year (5,490.08 aggregate hours per year × $69.36 per hour)		0
Currently approved aggregate burden		2,764,563 aggregate hours per year.	$175,980,426		0
Estimated revised aggregate burden		2,786,199 hours [12]	$193,250,787.60 [13]		0

Notes:

[1] We believe that the estimated internal hour burdens associated with the proposed amendment would be one-time initial burdens, and we amortize these burdens over three years.

[424] Based on data from Form ADV as of December, 2020.

[425] Based on data from Form ADV as of December, 2020, this figure represents registered investment advisers that: (i) Report no clients that are registered investment companies in response to Item 5.D, (ii) do not report any institutional separately managed accounts in Item 5.D., or separately managed account exposures in Section 5.K.(1) of Schedule D, and (iii) do not advise any reported hedge funds as per Section 7.B.(1) of Schedule D.

[426] *See supra* Section III.C.

[427] *See* DTCC ITP Forum Remarks, *supra* note 58.

[2] As with our estimates relating to the previous amendments to Advisers Act Rule 204–2, the Commission expects that performance of these functions would most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. Data from SIFMA's Office Salaries in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these position are $76 and $68, respectively. A blended hourly rate is therefore: (.17 × $76) + (.83 × $68) = $69.36 per hour.

[3] Under the currently approved PRA for Rule 204–2, there is no cost burden other than the cost of the hour burden described herein, and we believe that the proposed amendment would not result in any cost burden other than the cost of the hour burden.

[4] Based on staff experience, we estimate that approximately 50% of small and mid-sized registered investment advisers that have institutional clients, do not currently maintain the proposed records. Based on Form ADV data as of December 2020, we estimate that there are 199 and 241 mid-sized and small entity RIAs, respectively, that would be required to retain the proposed new records, for a total of 440 advisers (these are advisers that report the following on Form ADV Part 1A as of December 2020: (i) Having any clients that are registered investment companies in response to Item 5.D, (ii) having any institutional separately managed accounts in Item 5.D., or separately managed account exposures in Section 5.K.(1) of Schedule D, or (iii) advising any reported hedge funds as per Section 7.B.(1) of Schedule D). The categories of mid-size and small entity advisers are based on responses to the following Items of Form ADV Part 1A: Item 2.a.(2) (mid-size RIA) and Items 5.F. and 12 (small entity). 50% of 440 advisers = 220 advisers.

[5] We estimate an initial burden of 2 hours per adviser, to update procedures and instruct personnel to retain the proposed required records in the advisers' electronic recordkeeping systems, including any confirmations that they may receive in paper format and do not currently retain. We believe that these advisers already have recordkeeping systems to accommodate these records, which would include, at a minimum, spreadsheet formats and email retention systems which have an ability to capture a date and time stamp. For those advisers maintaining date and time stamped electronic records already, we estimate no incremental compliance costs.

[6] We believe that only a small number of advisers, or 1% of advisers that have institutional clients, do not send allocations or affirmations electronically to brokers or dealers (*e.g.,* they communicate them by telephone). 1% of 11,283 RIAs with institutional clients = 112.83 advisers (rounded to 113). For new large advisers, we estimate that there would be no incremental cost associated with this proposed amendment, as we believe these advisers would implement electronic systems as part of their initial compliance with Rule 204–2, and that these electronic systems would have an ability to capture a date and time stamp.

[7] We estimate that these advisers would incur an initial burden of 2 hours of updating their procedures and training their personnel to send these communications through their existing electronic systems (such as, at a minimum, their current spreadsheet formats and current email and electronic retention system to maintain electronic records with date and time stamps). Because these email and electronic retention systems would provide date and time stamps, we estimate there would be no incremental compliance costs in connection with the proposed date and time stamp requirement.

[8] As noted above, we estimate that 70% of institutional trades are affirmed by custodians, and therefore advisers may not retain or have access to the affirmations these custodians sent to brokers or dealers. We believe that some of these advisers themselves, however, sometimes send affirmations to brokers or dealers. Because we do not know the number of advisers that correlate to these trades, we estimate for purposes of this collection of information that 70% of advisers with institutional clients make institutional trades that are affirmed by custodians. This estimate equals 7,898.1 advisers, rounded to 7,898 advisers (70% of 11,283 RIAs with institutional clients = approximately 7,898 advisers).

[9] We estimate that the proposed amendments to rule 204–2 would result in an initial increase in the collection of information burden estimate by 2 hours for these advisers, to direct their institutional clients' custodians to electronically copy the adviser on any affirmations sent through email or for the adviser to use its systems to issue affirmations.

[10] 146.74 hours + 75.37 hours + 5,267.97 hours = 5,490.08 hours.

[11] 5,490.08 aggregate hours per year/13,804 total RIAs that are subject to Rule 204–2 = a blended average of 0.4 hours per adviser per year.

[12] The currently approved collection of information burden is 2,764,563 aggregate hours for 13,724 advisers, or 201.44 hours per adviser. The proposed new collection of information burden would add approximately 0.4 blended hours per adviser per year, for a total estimate of 201.84 blended hours per adviser per year, or 2,786,199 aggregate hours under amended Rule 204–2 for all registered advisers subject to the rule (201.84 blended hours per adviser × 13,804 RIAs subject to Rule 204–2 = 2,786,199 aggregate burden hours for RIAs).

[13] (201.84 estimated revised burden hours per adviser × $69.36 per hour) × 13,804 RIAs = $193,250,787.60 revised aggregate annual cost of the hour burden for Rule 204–2.

B. Proposed Rule 17Ad–27

The purpose of the collections under proposed Rule 17Ad–27 is to ensure that CMSPs facilitate the ongoing development of operational and technological improvements associated with the straight-through processing of institutional trades, which may in turn facilitate further shortening of the settlement cycle in the future. The collections are mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[428]

Respondents under this rule are the three CMSPs to which the Commission has granted an exemption from registration as a clearing agency. The Commission anticipates that one additional entity may seek to become a CMSP in the next three years, and so for purposes of this proposal the Commission has assumed four respondents.

Proposed Rule 17Ad–27 would require a CMSP to establish, implement, maintain, and enforce written policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for Rules 17Ad–22(d)(8) and 17Ad–22(e)(2),[429] the Commission estimates that respondent CMSPs would incur an aggregate one-time burden of approximately 56 hours to create new policies and procedures,[430] and that the aggregate cost of this one time burden would be $27,280.[431]

Proposed Rule 17Ad–27 would impose ongoing burdens on a respondent CMSP as follows: (i) Ongoing monitoring and compliance activities with respect to the written policies and procedures required by the proposed rule; and (ii) ongoing documentation activities with respect to the required annual report. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for Rule 17Ad–22(e)(23),[432] the Commission estimates that the ongoing activities required by proposed Rule 17Ad–27 would impose an aggregate annual burden on respondent CMSPs of 140 hours,[433] and an aggregate cost of $58,900.[434] The total industry cost is estimated to be $84,592.[435]

[428] *See, e.g.,* 5 U.S.C. 552 *et seq.* Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. *See* 5 U.S.C. 552(b)(8).

[429] *See* Clearing Agency Standards Adopting Release, *supra* note 404; CCA Standards Adopting Release, *supra* note 404.

[430] This figure was calculated as follows: (Assistant General Counsel for 8 hours + Compliance Attorney for 6 hours) = 14 hours × 4 respondent CMSPs = 56 hours.

[431] This figure was calculated as follows: (Assistant General Counsel at $602/hour × 8 hours = $4,816) + (Compliance Attorney at $334/hour × 6 hours = $2,004) = $6,820 × 4 CMSPs equals $27,280.

[432] *See* CCA Standards Adopting Release, *supra* note 404, at 70899.

[433] This figure was calculated as follows: (Compliance Attorney for 25 hours + Computer Operations Manager for 10 hours) = 34 hours × 4 respondent CMSPs = 136 hours. As discussed previously, *supra* note 407, the Commission estimates that the Inline XBRL requirement would require respondent CMSPs to incur one additional ongoing burden hour to apply and review Inline XBRL tags, as follows: (Compliance Attorney for 1 hour) × 4 CMSPs = 4 hours. Taken together, the total ongoing burden is 140 hours (136 hours + 4 hours = 140 hours).

[434] This figure was calculated as follows: [(Compliance Attorney at $397/hour × 24 hours = $9,528) + (Computer Operations Manager at $480/hour × 10 hours = $4,800)] = $14,328 × 4 CMSPs = $57,312. The Commission also estimates the costs associated with the one burden hour associated with applying and review Inline XBRL tags as follows: (Compliance Attorney at $397/hour × 1 hour = $397) × 4 CMSPs = $1,588. Taken together, the total amount is $58,900 ($57,312 + $1,588 = $58,900).

[435] This figure was calculated as follows: $27,280 (industry one-time burden) + $58,900 (industry ongoing burden) = $84,592.

TABLE 2—SUMMARY OF BURDEN ESTIMATES FOR PROPOSED RULE 17AD–27

Name of information collection	Type of burden	Number of respondents	Initial burden per entity (hours)	Ongoing burden per entity (hours)	Total annual burden per entity (hours)	Total industry burden (hours)
17Ad–27	Recordkeeping	4	56	35	91	364

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

154. Evaluate whether the proposed collections of information are necessary for the proper performance of the Commission's functions, including whether the information shall have practical utility;

155. Evaluate the accuracy of the Commission's estimates of the burdens of the proposed collections of information;

156. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

157. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and

158. Evaluate whether the proposed rules and rule amendments would have any effects on any other collection of information not previously identified in this section.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–[ ]–22. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–[ ]-22 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[436] a rule is ''major'' if it has resulted, or is likely to result in: An annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers or individual industries; or significant adverse effects on competition, investment, or innovation. The Commission requests comment on whether the proposed rules and rule amendments would be a ''major'' rule for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, the Commission solicits comment and empirical data on: The potential effect on the U.S. economy on annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment, or innovation.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires the Commission, in promulgating rules, to consider the impact of those rules on small entities.[437] Section 603(a) of the Administrative Procedure Act,[438] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on ''small entities.''[439] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[440] The Commission has prepared the following initial regulatory flexibility analysis in accordance with Section 603(a) of the RFA.

[436] Public Law 104–121, Title II, 110 Stat. 857 (1996).

[437] *See* 5 U.S.C. 601 *et seq.*

[438] 5 U.S.C. 603(a).

[439] Section 601(b) of the RFA permits agencies to formulate their own definitions of ''small entities.'' *See* 5 U.S.C. 601(b). The Commission has adopted definitions for the term ''small entity'' for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0–10.

[440] *See* 5 U.S.C. 605(b).

A. Proposed Rules and Amendments for Rules 15c6–1, 15c6–2, and 204–2

1. Reasons for, and Objectives of, the Proposed Actions

The Commission is proposing to amend Exchange Act Rule 15c6–1 to shorten the standard settlement cycle for securities transactions (other than those excluded by the rule) from T+2 to T+1. The Commission believes that the proposed amendments to Rule 15c6–1 to shorten the standard settlement cycle from two days to one day would offer market participants benefits by reducing exposure to credit, market, and liquidity risk, as well as related reductions to overall systemic risk.

The Commission is also proposing new Exchange Act Rule 15c6–2 to prohibit broker-dealers from entering into contracts with their institutional customers unless those contracts require that the parties complete allocations, confirmations, and affirmations by the end of the trade date. The Commission believes that new Rule 15c6–2 would help facilitate settlement of these institutional trades in a T+1 or shorter standard settlement cycle by promoting the timely transmission of trade data necessary to achieve settlement. Furthermore, the Commission believes that proposed Rule 15c6–2 would foster continued improvements in institutional trade processing, which should in turn also further improve accuracy and efficiency, reduce fails, and in turn, collectively reduce operational risk.

The Commission is proposing a related amendment to investment adviser recordkeeping rule under the Advisers Act designed to ensure that advisers that are parties to contracts under proposed Rule 15c6–2 retain records of confirmations received, and of the allocations and affirmations sent to a broker or dealer, with a date and time stamp that indicates when the allocation or affirmation was sent to the broker or dealer.

2. Legal Basis

The Commission proposes amendments to Rule 15c6–1 and new Rule 15c6–2 pursuant to authority set forth in the Exchange Act, particularly

Sections 15(c)(6),[441] 17A,[442] and 23(a).[443] The Commission proposes an amendment to Rule 204–2 pursuant to authority set forth in Sections 204 and 211 of the Advisers Act.[444]

3. Small Entities Subject to the Proposed Rule and Proposed Rule Amendments

Paragraph (c) of Exchange Act Rule 0–10 provides that, for purposes of Commission rulemaking in accordance with the provisions of the RFA, when used with reference to a broker or dealer, the Commission has defined the term ''small entity'' to mean a broker or dealer: (1) With total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[445] or if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[446]

Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[447]

The proposed amendments to Rule 15c6–1 would prohibit broker-dealers, including those that are small entities, from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities no later than the first business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. Proposed Rule 15c6–2 would prohibit broker-dealers, where the broker-dealer has agreed with its customer to engage in an allocation, confirmation, or affirmation process, from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) on behalf of a customer unless such broker or dealer has entered into a written agreement with the customer that requires the allocation, confirmation, affirmation, or any combination thereof, be completed no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with Rule 15c6–1(a). Based on FOCUS Report data, the Commission estimates that, as of June 30, 2021, approximately 1,439 of broker-dealers might be deemed small entities for purposes of this analysis.

The proposed amendment to Rule 204–2 would require that advisers that are parties to contracts under proposed Rule 15c6–2 retain records of confirmations received, and of the allocations and affirmations sent to a broker or dealer, with a date and time stamp for each allocation (as applicable) and each affirmation that indicates when the allocation or affirmation was sent to the broker or dealer. As discussed in Part VI above, the Commission estimates that based on IARD data as of December 30, 2020, approximately 11,283 investment advisers would be subject to the proposed amendment to rule 204–2 under the Advisers Act. Our proposed amendment would not affect most investment advisers that are small entities (''small advisers'') because they are generally registered with one or more state securities authorities and not with the Commission. Under Section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by state regulators.[448] Based on IARD data, the Commission estimates that as of December 2020, approximately 431 advisers registered with the Commission are small entities under the Regulatory Flexibility Act.[449] Of these, the Commission anticipates that 199, or 46% of small advisers registered with the Commission, would be subject to the proposed amendment under the Advisers Act.[450]

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments to Rule 15c6–1 would not impose any new reporting or recordkeeping requirements on broker-dealers that are small entities. However, the proposed amendments to Rule 15c6–1 may impact certain broker-dealers, including those that are small entities, to the extent that broker-dealers may need to make changes to their business operations and incur certain costs in order to operate in a T+1 environment.

For example, conversion to a T+1 standard settlement cycle may require broker-dealers, including those that are small entities, to make changes to their business practices, as well as to their computer systems, and/or to deploy new technology solutions. Implementation of these changes may require broker-dealers to incur new or increased costs, which may vary based on the business model of individual broker-dealers as well as other factors.

Additionally, conversion to a T+1 standard settlement cycle may also result in an increase in costs to certain broker-dealers who finance the purchase of customer securities until the broker-dealer receives payment from its customers. To pay for securities purchases, many customers liquidate other securities or money fund balances held for them by their broker-dealers in consolidated accounts such as cash management accounts. However, some broker-dealers may elect to finance the purchase of customer securities until the broker-dealer receives payment from its customers for those customers that do not choose to liquidate other securities or have a sufficient money fund balance prior to trade execution to pay for securities purchases. Broker-dealers that elect to finance the purchase of customer securities may incur an increase in costs in a T+1 environment resulting from settlement occurring one day earlier unless the broker-dealer can expedite customer payments.

Proposed Rule 15c6–2 would not impose any new reporting or recordkeeping requirements on broker-dealers that are small entities. However,

[441] 15 U.S.C. 78o(c)(6).

[442] 15 U.S.C. 78q–1.

[443] 15 U.S.C. 78w(a).

[444] 15 U.S.C. 80b–4 and 80b–11.

[445] 17 CFR 240.17a–5(c).

[446] 17 CFR 240.0–10(d).

[447] *See* 17 CFR 275.0–7.

[448] 15 U.S.C. 80b–3a.

[449] Based on responses from registered investment adviser to Items 5.F. and 12 of Form ADV.

[450] Based on data from Form ADV as of December 2020, this figure represents registered investment advisers that: (i) Report clients that are registered investment companies in response to Item 5.D, (ii) report any institutional separately managed accounts in Item 5.D., or have particular separately managed account exposures in Section 5.K.(1) of Schedule D, or (iii) advise reported hedge funds as per Section 7.B.(1) of Schedule D.

the proposed rule may impact certain broker-dealers, including those that are small entities, to the extent that broker-dealers may need to make changes to their business operations and incur certain costs in order to achieve trade date completion of institutional trade allocations, confirmations, and affirmations. For example, completion of allocations, confirmations, and affirmations on trade date may require broker-dealers, including those that are small entities, to make changes to their business practices, as well as to their computer systems, and/or to deploy new technology solutions. Implementation of these changes may require broker-dealers to incur new or increased costs, which may vary based on the business model of individual broker-dealers as well as other factors.

The proposed amendment to Rule 204–2 imposes certain reporting and compliance requirements on certain investment advisers, including those that are small entities. It would require them to retain records of each confirmation received, and any allocation and each affirmation sent given to a broker or dealer, with a date and time stamp for each allocation (if applicable) and affirmation that indicates when the allocation or affirmation was sent to the broker or dealer. The reasons for and objectives of, the proposed amendment to the books and records rule are discussed in more detail in Part III.C. These requirements as well as the costs and burdens on investment advisers, including those that are small entities, are discussed in Parts V and VI and below. As discussed above, there are approximately 431 small advisers, and approximately 199 small advisers would be subject to amendments to the books and records rule. As discussed in Part VI.A, the proposed amendments to Rule 204–2 under the Advisers Act would increase the annual burden by approximately 0.4 blended hours per adviser per year, or an increased burden of 172.4 blended hours in the aggregate for small advisers.[451] The Commission therefore believes the annual monetized aggregate cost to small advisers associated with our proposed amendments would be approximately $11,957.66.[452]

5. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that no federal rules duplicate, overlap or conflict with the proposed amendments to Rule 15c6–1, proposed Rule 15c6–2, or the proposed amendment to Rule 204–2.

6. Significant Alternatives

The RFA requires that the Commission include in its regulatory flexibility analysis a description of any significant alternatives to the proposed rule which would accomplish the stated objectives of applicable statutes and which would minimize any significant economic impact of the proposed rule on small entities.[453] Pursuant to Section 3(a) of the RFA, the Commission's initial regulatory flexibility analysis must consider certain types of alternatives, including: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of the compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part of thereof, for such small entities.[454]

The Commission considered alternatives to the proposed amendments to Rule 15c6–1 that would accomplish the stated objectives of the amendment without disproportionately burdening broker-dealers that are small entities, including: Differing compliance requirements or timetables; clarifying, consolidating or simplifying the compliance requirements; using performance rather than design standards; or providing an exemption for certain or all broker-dealers that are small entities. The purpose of Rule 15c6–1 is to establish a standard settlement cycle for broker-dealer transactions. Alternatives, such as different compliance requirements or timetables, or exemptions, for Rule 15c6–1, or any part thereof, for small entities would prevent the establishment of a standard settlement cycle and create substantial confusion over when transactions will settle. Allowing small entities to settle at a time later than T+1 could create a two-tiered market in which order flow for small entities would not coincide with that of other firms operating on a T+1 settlement cycle. Additionally, the Commission believes that establishing a single timetable (*i.e.,* compliance date) for all broker-dealers, including small entities, to comply with the amendment is necessary to ensure that the transition to a T+1 standard settlement cycle takes place in an orderly manner that minimizes undue disruptions in the securities markets. In particular, because broker-dealers do not always know the identity of their counterparty when they enter a transaction, providing broker-dealers that are small entities with an exemption from the standard settlement cycle would likely create substantial confusion over when a transaction will settle. With respect to using performance rather than design standards, the Commission used performance standards to the extent appropriate under the statute. For example, broker-dealers have the flexibility to settle transactions under a standard settlement cycle shorter than T+1. For firm commitment offerings, small entities do retain the option under paragraph (d) to agree with their counterparty in advance of the transaction to use a settlement cycle other than T+1. In addition, under the proposed rule amendment, broker-dealers retain flexibility to tailor their contracts, systems and processes to choose how to comply with the rule most effectively. In Part V.C.5.b)(3), the Commission preliminarily estimates the costs likely to be incurred by broker-dealers to implement a T+1 standard settlement cycle.

The Commission also considered alternatives to proposed Rule 15c6–2 that would accomplish the stated objectives of the new rule without disproportionately burdening broker-dealers that are small entities, including: Differing compliance requirements or timetables; clarifying, consolidating or simplifying the compliance requirements; using performance rather than design standards; or providing an exemption for certain or all broker-dealers that are small entities. The purpose of proposed Rule 15c6–2 is to achieve trade date completion of institutional trade allocations, confirmations, and affirmations to facilitate a T+1 standard settlement cycle. Alternatives, such as different compliance requirements or timetables, or exemptions, for Rule 15c6–2, or any part thereof, for small entities would undermine the purpose of establishing a standard settlement cycle. For example, allowing small entities to complete the allocation, confirmation, and affirmation processes at a time later than trade date could create a two-tiered market that could work to the detriment of small entities whose post-trade processing would not coincide with that of other firms operating on a T+1 settlement cycle. Additionally, the Commission believes

[451] 0.4 hour × 431 small advisers = 172.4 blended hours in the aggregate for small advisers.

[452] 172.4 blended hours × $69.36 per hour = $11,957.66. *See* Part VI.A for a discussion of the monetized cost of the hour burden per adviser.

[453] 5 U.S.C. 603(c).

[454] *Id.*

that establishing a single timetable (*i.e.,* compliance date) for all broker-dealers, including small entities, to comply with the new rule is necessary to ensure that the transition to a T+1 standard settlement cycle takes place in an orderly manner that minimizes undue disruptions in the securities markets. With respect to using performance rather than design standards, the Commission used performance standards to the extent appropriate under the statute. Under the proposed rule, broker-dealers have the flexibility to tailor their systems and processes, and generally to choose how, to comply with the new rule.

The Commission considered alternatives to the proposed amendment to Rule 204–2 that would accomplish the stated objectives of the amendment without disproportionately burdening investment advisers that are small entities, including: Differing compliance or reporting requirements or timetables that take into account the resources available to small entities; clarifying, consolidating or simplifying the compliance and reporting requirements; using performance rather than design standards; or providing an exemption from coverage of all or part of the proposed rule for investment advisers that are small entities. Regarding the first and fourth alternatives, the Commission believes that establishing different compliance or reporting requirements or timetables for small advisers, or exempting small advisers from the proposed rule, or any part thereof, would be inappropriate under these circumstances. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small firms, it would be inconsistent with the purposes of the Advisers Act to specify differences for small entities under the proposed amendment to Rule 204–2. While it is the staff's experience that some small and mid-size advisers do not currently retain these records—whereas most larger advisers already retain them—the Commission believes that the initial burden on small advisers of retaining the proposed records would not be large.[455] As discussed above, the Commission believes these advisers would need to update their policies and procedures and instruct personnel to retain these records in their electronic recordkeeping systems, including any confirmations that they may have retained in paper format. However, because the Commission believes these advisers already have recordkeeping systems to accommodate these records (which would include, at a minimum, existing spreadsheet formats and email retention systems), the Commission does not believe the two hour additional burden of complying with this proposed amendment would warrant establishing a different timetable for compliance for small advisers. In addition, as discussed above, our staff would use the information that advisers would maintain to help prepare for examinations of investment advisers and verify that an adviser has completed the steps necessary to complete settlement in a timely manner in accordance with proposed rule 15c6–1(a). Establishing different conditions for large and small advisers would negate these benefits. Regarding the second alternative, we believe the current proposal is clear and that further clarification, consolidation, or simplification of the compliance requirements is not necessary. Our proposal states the types of communications—confirmations, any allocations, and affirmations—that advisers must retain in their records, and that allocations (if applicable) and affirmations must be date and time stamped. We believe that by proposing to clearly list these types of communications as required records, advisers will not need to parse whether, and if so which, current requirement under Rule 204–2 captures these post-trade communications. Further, the proposed requirement to date and time stamp the allocations (if applicable) and affirmations sent to a broker or dealer is clear and consistent with many advisers' current practices of date and time stamping these records, as discussed in Part VI.A, above.[456] Regarding the third alternative, the proposed amendment to Rule 204–2 is narrowly tailored to correspond to the proposed rules and rule amendments under the Exchange Act, and using performance rather than design standards would be inconsistent with our statutory mandate to protect investors, as advisers must maintain books and records in a uniform and quantifiable manner that it is useful to our regulatory and examination program.

7. Request for Comment

The Commission encourages written comments on matters discussed in the initial RFA. In particular, the Commission seeks comment on the number of small entities that would be affected by the proposed amendments to Rule 15c6–1, proposed Rule 15c6–2, and the proposed amendment to Rule 204–2, and whether the effect(s) on small entities would be economically significant. Commenters are asked to describe the nature of any effect(s) the proposed amendments to Rule 15c6–1, proposed Rule 15c6–2, and the proposed amendment to Rule 204–2 may have on small entities, and to provide empirical data to support their views.

B. Proposed Rule 17Ad–27

Proposed Rule 17Ad–27 would apply to clearing agencies that are CMSPs. For the purposes of Commission rulemaking, a small entity includes, when used with reference to a clearing agency, a clearing agency that (i) compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter), and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[457]

Based on the Commission's existing information about the CMSPs that would be subject to Rule 17Ad–27, the Commission believes that all such CMSPs would not fall within the definition of a small entity described above.[458] While other CMSPs may emerge and seek to register as clearing agencies or obtain exemptions from registration as a clearing agency with the Commission, the Commission does not believe that any such entities would be ''small entities'' as defined in 17 CFR 240.0–10(d). Accordingly, the Commission believes that any such CMSP would exceed the thresholds for ''small entities'' set forth in in 17 CFR 240.0–10.

For the reasons described above, the Commission preliminarily believes that proposed Rule 17Ad–27 would not have a significant economic impact on a substantial number of small entities and requests comment on this analysis.

[455] *See supra* Part III.C.

[456] As noted above, however, we estimate that 50% of small and mid-sized advisers that have institutional clients do not currently maintain these records, and 1% of advisers that have institutional clients, do not send allocations or affirmations electronically to brokers or dealers.

[457] *See* 17 CFR 240.0–10(d).

[458] DTCC ITP Matching is a subsidiary of DTCC, and in 2020, DTCC processed $2.329 quadrillion in financial transactions. DTCC, 2020 Annual Report. As of December 1, 2021, SS&C Technologies Holdings, Inc. (NASDAQ: SSNC) had a market capitalization of $19.35 billion. Bloomberg STP LLC is a wholly-owned by Bloomberg L.P., a global business and financial information and news company.

Statutory Authority and Text of the Proposed Rules and Rule Amendments

The Commission is proposing amendments to Rule 15c6–1, new Rule 15c6–2, and new Rule 17Ad–27 under the Commission's rulemaking authority set forth in Sections 15(c)(6), 17A and 23(a) of the Exchange Act [15 U.S.C. 78o(c)(6), 78q–1, and 78w(a) respectively]. The Commission is proposing amendments to Rule 204–2 under the Advisers Act under the authority set forth in Sections 204 and 211 of the Advisers Act [15 U.S.C. 80b–4 and 80b–11].

List of Subjects in 17 CFR Parts 232, 240, and 275

Reporting and recordkeeping requirements, Securities.

Text of Amendment

For the reasons stated in the preamble, the Securities and Exchange Commission proposes to amend 17 CFR parts 232, 240, and 275 as set forth below:

PART 232— REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 232.101 by adding paragraph (xxii) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xxii) Reports filed pursuant to Rule 17Ad–27 (§ 240.17Ad–27) under the Exchange Act.

■ 3. Add § 232.409 to read as follows:

§ 232.409 Straight-through processing report interactive data.

The straight-through processing report required by Rule 17Ad–27 (§ 240.17Ad–27) under the Exchange Act must be submitted in Inline XBRL in accordance with the EDGAR Filer Manual.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 4. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et. seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 5. Amend § 240.15c6–1 by reserving paragraph (c) and revising paragraphs (a), (b), and (d) to read as follows:

§ 240.15c6–1 Settlement cycle.

(a) Except as provided in paragraphs (b) and (d) of this section, a broker or dealer shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the first business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(b) Paragraph (a) of this section shall not apply to contracts:

(1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association;

(2) For the purchase or sale of securities that the Commission may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of this section, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the public interest and the protection of investors.

(c) Reserved.

(d) For purposes of paragraph (a) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to such date for all securities sold pursuant to such offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

■ 6. Add § 240.15c6–2 to read as follows:

§ 240.15c6–2 Same-day allocation, confirmation, and affirmation.

For contracts where parties have agreed to engage in an allocation, confirmation, or affirmation process, no broker or dealer shall effect or enter into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) on behalf of a customer unless such broker or dealer has entered into a written agreement with the customer that requires the allocation, confirmation, affirmation, or any combination thereof, be completed as soon as technologically practicable and no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with paragraph (a) of § 240.15c6–1.

■ 7. Add § 240.17Ad–27 to read as follows:

§ 240.17Ad–27 Straight-through processing by central matching service providers.

A clearing agency that provides a central matching service for transactions involving broker-dealers and their customers must establish, implement, maintain, and enforce policies and procedures that facilitate straight-through processing. Such clearing agency also must submit to the Commission every twelve months a report that describes the following:

(a) Its current policies and procedures for facilitating straight-through processing;

(b) Its progress in facilitating straight-through processing during the twelve-month period covered by the report; and

(c) The steps it intends to take to facilitate straight-through processing during the twelve-month period that follows the period covered by the report.

The report must be filed electronically on EDGAR and must be provided as interactive data as required by § 232.409 of this chapter (Rule 409 of Regulation S–T) in accordance with the EDGAR Filer Manual.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 8. The authority citation for part 275 continues to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.204–2 is also issued under 15 U.S.C 80b–6.

* * * * *

■ 9. Amend § 275.204–2 by revising paragraph (a)(7)(iii) to read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

(a) * * *

(7) * * *

(iii) The placing or execution of any order to purchase or sell any security; and if the adviser is a party to a contract under rule § 240.15c6–2, each confirmation received, and any allocation and each affirmation sent, with a date and time stamp for each allocation (if applicable) and affirmation that indicates when the allocation or affirmation was sent to the broker or dealer.

* * * * *

By the Commission.

Dated: February 9, 2022.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2022–03143 Filed 2–23–22; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 87 Thursday,

No. 37 February 24, 2022

Part III

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 54

Required Minimum Distributions; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[REG–105954–20]

RIN 1545–BP82

Required Minimum Distributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to required minimum distributions from qualified plans; section 403(b) annuity contracts, custodial accounts, and retirement income accounts; individual retirement accounts and annuities; and eligible deferred compensation plans under section 457. These regulations will affect administrators of, and participants in, those plans; owners of individual retirement accounts and annuities; employees for whom amounts are contributed to section 403(b) annuity contracts, custodial accounts, or retirement income accounts; and beneficiaries of those plans, contracts, accounts, and annuities.

DATES: Written or electronic comments must be received by May 25, 2022. Outlines of topics to be discussed at the public hearing scheduled for June 15, 2022, at 10:00 a.m. must be received by May 25, 2022.

As of February 24, 2022, § 1.408–8 of the notice of proposed rulemaking that was published in the **Federal Register** on July 14, 1981 (46 FR 36198) is withdrawn.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–105954–20) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG–105954–20), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Brandon M. Ford or Laura B. Warshawsky, (202) 317–6700; concerning submissions of comments and outlines of topics for the public hearing, Regina Johnson, (202) 317–5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 401(a)(9) of the Internal Revenue Code of 1986 (Code). These proposed regulations address the required minimum distribution requirements for plans qualified under section 401(a) and are being proposed to update the regulations to reflect the amendments made to section 401(a)(9) by sections 114 and 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act of 2019, Public Law 116–94, 133 Stat. 2534 (2019).

The rules of section 401(a)(9) are adopted by reference in section 408(a)(6) and (b)(3) for individual retirement accounts and individual retirement annuities (collectively, IRAs), section 408A(c)(5) for Roth IRAs, section 403(b)(10) for annuity contracts, custodial accounts, and retirement income accounts described in section 403(b) (section 403(b) plans), and section 457(d) for eligible deferred compensation plans. The determination of the required minimum distribution is also relevant for purposes of the related excise tax under section 4974 and the definition of eligible rollover distribution in section 402(c). Accordingly, this document also contains proposed conforming amendments to the Income Tax Regulations (26 CFR part 1) under sections 402(c), 403(b), 408, and 457, and to the Pension Excise Tax Regulations (26 CFR part 54) under section 4974.

Section 401(a)(9)—Required Minimum Distributions

Section 401(a)(9) provides rules for distributions from a qualified plan during the life of the employee in section 401(a)(9)(A) and after the death of the employee in section 401(a)(9)(B). The rules set forth a required beginning date for distributions and identify the period over which the employee's entire interest must be distributed.

Specifically, section 401(a)(9)(A)(ii) provides that the entire interest of an employee in a qualified plan must be distributed, beginning not later than the employee's required beginning date, in accordance with regulations, over the life of the employee or over the lives of the employee and a designated beneficiary (or over a period not extending beyond the life expectancy of the employee and a designated beneficiary). Section 401(a)(9)(B)(i) provides that, if the employee dies after distributions have begun, the employee's remaining interest must be distributed at least as rapidly as under the distribution method used by the employee as of the date of the employee's death.

Section 401(a)(9)(B)(ii) and (iii) provides that, if the employee dies before required minimum distributions have begun, the employee's interest must either be: (1) Distributed (in accordance with regulations) over the life or life expectancy of the designated beneficiary with the distributions generally beginning no later than 1 year after the date of the employee's death; or (2) distributed within 5 years after the death of the employee. However, under section 401(a)(9)(B)(iv), a surviving spouse may wait until the date the employee would have attained age 72 to begin taking required minimum distributions.

Section 401(a)(9)(C) (as amended by section 114 of the SECURE Act) defines the required beginning date for an employee (other than a 5-percent owner or IRA owner) as April 1 of the calendar year following the later of the calendar year in which the employee attains age 72 or the calendar year in which the employee retires. For a 5-percent owner or an IRA owner, the required beginning date is April 1 of the calendar year following the calendar year in which the individual attains age 72, even if the individual has not retired. Section 401(a)(9)(C)(iii) provides that certain employees who commence benefits under a defined benefit plan after the year in which they attain age 70½ must receive an actuarial increase.

Section 401(a)(9)(D) provides that (except in the case of a life annuity) the life expectancy of an employee and the employee's spouse that is used to determine the period over which payments must be made may be redetermined, but not more frequently than annually.

Section 401(a)(9)(E)(i) defines the term *designated beneficiary* as any individual designated as a beneficiary by the employee. Section 401(a)(9)(E)(ii) (which was added as part of section 401 of the SECURE Act) defines the term *eligible designated beneficiary* with respect to any employee, as any designated beneficiary who, as of the date of the employee's death, is: (1) The surviving spouse of the employee; (2) a child of the employee who has not reached the age of majority (within the meaning of section 401(a)(9)(F)); (3) disabled (within the meaning of section 72(m)(7)); (4) a chronically ill individual (within the meaning of section 7702B(c)(2), subject to certain exceptions); or (5) an individual not described elsewhere in section 401(a)(9)(E)(ii) who is not more than 10 years younger than the employee.

Section 401(a)(9)(E)(iii) provides that, subject to the rule in section 401(a)(9)(F), the treatment of an employee's child as an eligible designated beneficiary ends when the child attains the age of majority and that any remaining interest must be distributed within 10 years of that date. Section 401(a)(9)(F) provides that, under regulations, any amount paid to a child is treated as if it had been paid to the surviving spouse if it will be paid to the surviving spouse upon that child reaching the age of majority (or other designated event permitted under regulations).

Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of section 401(a) is treated as a required minimum distribution.

Section 401(a)(9)(H) (which was added as part of section 401 of the SECURE Act) provides special rules that generally apply to the distribution of an employee's remaining interest in a defined contribution plan after the death of that employee. Specifically, section 401(a)(9)(H)(i) provides that, except in the case of a beneficiary who is not a designated beneficiary, section 401(a)(9)(B)(ii): (1) Is applied by substituting 10 years for 5 years; and (2) applies whether or not distributions of the employee's interest have begun in accordance with section 401(a)(9)(A). Section 401(a)(9)(H)(ii) provides that section 401(a)(9)(B)(iii) (permitting payments over the life or life expectancy of the designated beneficiary as an alternative to the 10-year rule) applies only in the case of an eligible designated beneficiary. Section 401(a)(9)(H)(iii) provides that if an eligible designated beneficiary dies before the employee's interest is entirely distributed, then section 401(a)(9)(H)(ii) does not apply to the beneficiary of the eligible designated beneficiary, and the remainder of the employee's interest must be distributed within 10 years after the death of the eligible designated beneficiary.

Section 401(a)(9)(H)(iv) provides that in the case of an applicable multi-beneficiary trust, if, under the terms of the trust, it is to be divided immediately upon the death of the employee into separate trusts for each beneficiary, then section 401(a)(9)(H)(ii) is applied separately with respect to the portion of the employee's interest that is payable to any disabled or chronically ill eligible designated beneficiary. Section 401(a)(9)(H)(iv) also provides that in the case of an applicable multi-beneficiary trust, if, under the terms of the trust, no individual (other than an eligible designated beneficiary who is disabled or chronically ill) has any right to the employee's interest in the plan until the death of all of those disabled or chronically ill eligible designated beneficiaries with respect to the trust, then: (1) Section 401(a)(9)(B)(iii) (permitting payments over the life expectancy of a beneficiary) will apply to the distribution of the employee's interest; and (2) any beneficiary who is not disabled or chronically ill will be treated as a beneficiary of the eligible designated beneficiary who is disabled or chronically ill upon the death of that eligible designated beneficiary.

Section 401(a)(9)(H)(v) defines the term *applicable multi-beneficiary trust* as a trust: (1) Which has more than one beneficiary; (2) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to section 401(a)(9); and (3) at least one of the beneficiaries of which is an eligible designated beneficiary who is either disabled or chronically ill.

Section 401(a)(9)(H)(vi) provides that, for purposes of applying section 401(a)(9)(H), an eligible retirement plan defined in section 402(c)(8)(B) (other than a defined benefit plan described in section 402(c)(8)(B)(iv) or (v) or a qualified trust that is a part of a defined benefit plan) is treated as a defined contribution plan.[1]

Prior to amendment by section 114 of the SECURE Act, section 401(a)(9)(C) of the Code defined the required beginning date by reference to the calendar year in which the employee attains age 70½. Section 114(d) of the SECURE Act provides that the amendments made by section 114 of the SECURE Act apply to distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after that date.

Section 401(b)(1) of the SECURE Act provides that, generally, the amendments made to section 401(a)(9)(E) and (H) of the Code apply to distributions with respect to employees who die after December 31, 2019.

Section 401(b)(2) of the SECURE Act provides that in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers that were ratified before December 20, 2019, the amendments to sections 401(a)(9)(E) and (H) of the Code apply to distributions with respect to employees who die in calendar years beginning after December 31, 2021, or if earlier, the later of: (1) The date on which the last of the collective bargaining agreements terminated (without regard to any extension of the agreement to which the parties agree on or after December 20, 2019), or (2) December 31, 2019.

Section 401(b)(3) of the SECURE Act provides that in the case of a governmental plan (as defined in section 414(d) of the Code), the amendments to sections 401(a)(9)(E) and (H) will apply to distributions with respect to employees who die after December 31, 2021.

Section 401(b)(4) of the SECURE Act provides that the amendments made to sections 401(a)(9)(E) and (H) of the Code do not apply to a qualified annuity that is a binding annuity contract in effect on December 20, 2019, and at all times thereafter.[2]

Section 401(b)(5) of the SECURE Act provides that if an employee dies before the effective date of section 401(a)(9)(H)

[1] The eligible retirement plans described in section 402(c)(8)(B)(iv) and (v) are an annuity plan described in section 403(a) and an eligible deferred compensation plan described in section 457(b) that is maintained by an eligible employer described in section 457(e)(1)(A), respectively.

[2] Section 401(b)(4)(B) of the SECURE Act provides that the term *qualified annuity* means, with respect to an employee, an annuity—

(i) which is a commercial annuity (as defined in section 3405(e)(6) of the Internal Revenue Code of 1986);

(ii) under which the annuity payments are made over the life of the employee or over the joint lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the joint life expectancy of such employee and a designated beneficiary) in accordance with the regulations described in section 401(a)(9)(A)(ii) of such Code (as in effect before such amendments) and which meets the other requirements of section 401(a)(9) of such Code (as so in effect) with respect to such payments; and

(iii) with respect to which—

(I) annuity payments to the employee have begun before the date of enactment of the SECURE Act, and the employee has made an irrevocable election before such date as to the method and amount of the annuity payments to the employee or any designated beneficiaries; or

(II) if subclause (I) does not apply, the employee has made an irrevocable election before the date of enactment of the SECURE Act as to the method and amount of the annuity payments to the employee or any designated beneficiaries.

of the Code for a plan, then, in applying the amendments made to sections 401(a)(9)(E) and (H) to the employee's designated beneficiary who dies on or after the effective date, (1) the amendments apply to any beneficiary of the designated beneficiary, and (2) the designated beneficiary is treated as an eligible designated beneficiary for purposes of section 401(a)(9)(H)(ii).

Section 402(c)—Rollovers

Section 402(c) provides rules related to the rollover of a distribution from a qualified plan to another eligible retirement plan. Prior to being amended by section 641 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16, 115 Stat. 38 (2001) (EGTRRA), section 402(c)(2) of the Code limited the portion of a distribution that could be rolled over to the amount that would have been includible in income in the absence of the rollover. Section 641 of EGTRRA and section 411(q) of the Job Creation and Worker Assistance Act of 2002, Public Law 107–147, 116 Stat. 21 (2002), expanded the rollover rules to permit a rollover to an IRA of the portion of the distribution that would have been excluded from gross income in the absence of the rollover (that is, the portion of the amount distributed that consists of the employee's investment in the contract). In addition, that portion may be transferred in a direct trustee-to-trustee transfer to a qualified trust or to an annuity contract described in section 403(b) of the Code, but only if the trust or annuity contract separately accounts for the amount that consists of the employee's investment in the contract. If only a portion of an eligible rollover distribution is rolled over or transferred, then the amount rolled over or transferred is treated as consisting first of the portion of the distribution that is not allocable to the employee's investment in the contract.

Under section 402(c), any amount distributed from a qualified plan generally will be excluded from income if it is transferred to an eligible retirement plan no later than the 60th day following the day the distribution is received. Section 402(c)(3)(B) was added by section 644 of EGTRRA to provide that the Secretary may waive the 60-day rollover requirement in certain circumstances. Section 402(c)(3)(C) was added to the Code by section 13613 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054 (2017) (TCJA) to provide an extended rollover deadline for qualified plan loan offset (QPLO) amounts.[3] Specifically, the deadline for rollover of any portion of a QPLO amount is extended so that it ends no earlier than the distributee's tax filing due date (including extensions) for the taxable year in which the offset occurs.

Subject to certain exclusions, section 402(c)(4) provides that an eligible rollover distribution means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified plan. Section 402(c)(4)(A) excludes from the definition of an eligible rollover distribution any distribution that is one of a series of substantially equal periodic payments payable for the life (or life expectancy) of the employee (or the employee and the employee's designated beneficiary), or for a specified period of 10 years or more. Section 402(c)(4)(B) provides that any distribution that is required under section 401(a)(9) is excluded from the definition of an eligible rollover distribution. Section 402(c)(4)(C), which was added by section 636(b)(1) of EGTRRA, excludes hardship distributions from the definition of an eligible rollover distribution.

Prior to being amended by section 641 of EGTRRA, section 402(c)(8)(B) of the Code provided that the only type of eligible retirement plan permitted to receive a rollover from a qualified plan was another qualified plan or an IRA. Section 641 of EGTRRA amended section 402(c)(8)(B) to expand the list of retirement plans eligible to receive rollovers to include an annuity contract described in section 403(b) of the Code, and an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A). Section 617(c) of EGTRRA amended section 402(c)(8)(B) of the Code to provide that if any portion of an eligible rollover distribution is attributable to distributions from a designated Roth account (as defined in section 402A), that portion may be rolled over only to another designated Roth account or a Roth IRA (as described in section 408A). Section 641 of EGTRRA also added section 402(c)(10) to the Code to provide that an eligible deferred compensation plan described in section 457(b) maintained by an eligible employer described in section 457(e)(1)(A) may accept rollovers from a different type of eligible retirement plan only if it separately accounts for the amounts rolled into the plan.

Section 402(c)(9) provides that, if any distribution attributable to an employee is paid to the spouse of the employee after the employee's death, then section 402(c) applies to that distribution in the same manner as if the spouse were the employee. At the time section 402(c)(9) was enacted, a surviving spouse was permitted to roll over an eligible rollover distribution only to an IRA. However, section 641 of EGTRRA amended section 402(c)(9) of the Code to expand the type of eligible retirement plan permitted to receive a spousal rollover to include not just an IRA, but also any other eligible retirement plan.

Section 402(c)(11) of the Code was added by section 829 of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780 (2006) (PPA), to provide that an individual who is not the surviving spouse of the employee and who is a designated beneficiary (as defined by section 401(a)(9)(E) of the Code) may elect to have any portion of a distribution made in the form of a direct trustee-to-trustee transfer to an individual retirement plan established for the purpose of receiving that distribution. If a direct trustee-to-trustee transfer is made pursuant to section 402(c)(11), then the required minimum distribution rules applicable to distributions after the employee's death in section 401(a)(9)(B) (other than section 401(a)(9)(B)(iv)) will apply to the individual retirement plan.

The rollover rules of section 402(c) also apply to a distribution from a section 403(a) qualified annuity plan, a section 403(b) plan, and an eligible deferred compensation plan described in section 457(b) maintained by an eligible employer described in section 457(e)(1)(A). See sections 403(a)(4)(B), 403(b)(8)(B), and 457(e)(16)(B), respectively.

Sections 403(a), 403(b), 408, and 457—Other Arrangements Subject to Section 401(a)(9)

Under section 403(a)(1), a qualified annuity plan under section 403(a) must meet the requirements of section 404(a)(2) (which provides that an annuity plan must satisfy the required minimum distribution rules under section 401(a)(9)). Sections 403(b)(10), 408(a)(6), and 408(b)(3) provide that a section 403(b) plan, an individual retirement account, and an individual retirement annuity, respectively, must satisfy rules similar to the requirements of section 401(a)(9) and the incidental death benefit requirements of section

[3] A QPLO amount is defined in section 402(c)(3)(C)(ii) as a plan loan offset amount that is distributed from a qualified employer plan to a participant or beneficiary solely by reason of: (1) The termination of the qualified employer plan, or (2) the failure to meet the repayment terms of the loan from the plan because of the severance from employment of the participant.

401(a). Under section 457(b)(5) and (d)(2), a plan is an eligible deferred compensation plan described in section 457(b) only if it satisfies the minimum distribution requirements of section 401(a)(9).

Section 4974—Excise Tax on Failure To Satisfy Section 401(a)(9)

Section 4974(a) provides that if the amount distributed during the taxable year of a payee under any qualified retirement plan (as defined in section 4974(c)) or any eligible deferred compensation plan (as defined in section 457(b)) is less than that taxable year's minimum required distribution (as defined in section 4974(b)), then an excise tax is imposed on the payee equal to 50 percent of the amount by which the minimum required distribution for the taxable year exceeds the amount actually distributed in that taxable year.

Section 4974(d) provides that if the taxpayer establishes to the satisfaction of the Secretary that the failure to distribute the entire amount required in a taxable year was due to reasonable error and reasonable steps are being taken to remedy that shortfall, then the Secretary may waive the excise tax imposed in section 4974(a) for that taxable year.

Good Faith Compliance Standard for Governmental Plans

Section 823 of PPA provides that a governmental plan (as defined in section 414(d) of the Code) is treated as having complied with section 401(a)(9) if the plan complies with a reasonable, good faith interpretation of section 401(a)(9).

Existing Regulations

Final regulations relating to required minimum distributions from a qualified plan, an IRA, and a section 403(b) plan, have been subject to a series of amendments and additions since they were published in the **Federal Register** on April 17, 2002 (67 FR 18988).[4] Final regulations relating to required minimum distributions from defined benefit plans and annuity contracts were published in the **Federal Register** on June 15, 2004 (69 FR 68077). Final regulations published in the **Federal Register** on September 8, 2009 (74 FR 45993) updated the rules to permit a governmental plan to comply with the required minimum distribution rules using a reasonable, good faith interpretation of section 401(a)(9). Final regulations relating to qualified longevity annuity contracts were published in the **Federal Register** on July 2, 2014 (79 FR 37633). Final regulations published in the **Federal Register** on November 12, 2020 (85 FR 72477) updated the life expectancy and distribution period tables for distribution calendar years that begin on or after January 1, 2022.

Final regulations relating to section 402(c) and eligible rollover distributions were published in the **Federal Register** on September 22, 1995 (60 FR 49199). Since those regulations were issued, section 402(c) has been amended several times, and guidance related to those amendments has generally been issued in the Internal Revenue Bulletin rather than through the issuance of new regulations. For example, Notice 2007–7, 2007–1 C.B. 395, provided guidance related to the amendments to section 402(c) made by PPA. However, final regulations related to the extended period of time to roll over a QPLO amount under section 402(c)(3)(C) were published in the **Federal Register** on January 6, 2021 (86 FR 464). See § 1.402(c)–3.

Explanation of Provisions

These proposed regulations would update several existing regulations under sections 401(a)(9), 402(c), 403(b), 457, and 4974 to reflect statutory amendments that have been made since those regulations were last issued. These proposed regulations also clarify certain issues that have been raised in public comments and private letter ruling requests. These proposed regulations also replace the question-and-answer format of the existing regulations under sections 401(a)(9), 402(c), 408, and 4974 with a standard format. Rules under the existing regulations that are retained in these proposed regulations are generally not discussed in this Explanation of Provisions.

I. Section 401(a)(9) Regulations

A. Section 1.401(a)(9)–1—Minimum Distribution Requirement in General

1. Statutory Effective Date of the Limitation on Beneficiary Life Expectancy Distributions

Proposed § 1.401(a)(9)–1 provides general rules that apply for all of the regulations under section 401(a)(9), including rules addressing application of the effective date of new section 401(a)(9)(H), which was added by section 401 of the SECURE Act to limit life expectancy distributions for beneficiaries. Generally, the amendments made by section 401 of the SECURE Act apply to distributions with respect to an employee who dies on or after January 1, 2020 (with a later effective date for certain collectively bargained plans or governmental plans). In addition, if an employee in a plan died before the section 401(a)(9)(H) effective date for that plan, the employee had only one designated beneficiary, and the employee's designated beneficiary dies on or after that effective date, then the amendments made by section 401 of the SECURE Act apply to any beneficiary of the designated beneficiary. In this situation, the designated beneficiary is treated as an eligible designated beneficiary for purposes of the 10-year payout required by section 401(a)(9)(H)(iii). Accordingly, the death of the designated beneficiary triggers a requirement to complete payment within 10 years of the death of that designated beneficiary. In contrast, if that designated beneficiary died before that effective date, then the amendments made by section 401 of the SECURE Act do not apply with respect to the employee's interest under the plan.

These proposed regulations provide that if an employee in a plan who dies before the section 401(a)(9)(H) effective date for that plan has more than one designated beneficiary, whether the amendments made by section 401 of the SECURE Act apply depends on when the oldest of those beneficiaries dies. Thus, for example, if an employee who died before January 1, 2020, named a see-through trust as the sole beneficiary of the employee's interest in the plan, and the trust has three beneficiaries who are all individuals, then the amendments made by section 401 of the SECURE Act will apply with respect to distributions to the trust upon the death of the oldest trust beneficiary, but only if that beneficiary dies on or after the section 401(a)(9)(H) effective date for that plan. However, if the oldest of the trust beneficiaries died before that effective date, then the amendments made by section 401 of the SECURE Act do not apply with respect to distributions to the trust.

For purposes of applying the statutory effective date, these proposed regulations provide that if, pursuant to section 401(a)(9)(B)(iv), a surviving spouse is waiting to begin distributions until the year for which the employee would have been first required to take distributions, then the spouse is treated as the employee. Thus, in that case, if the spouse died before January 1, 2020, but the spouse's designated beneficiary dies after the section 401(a)(9)(H) effective date for the plan, section 401(a)(9)(H) applies to any beneficiary of the spouse's designated beneficiary

[4] Final regulations under section 4974 (relating to excise taxes for excess accumulations in qualified plans) were published at the same time but have not been amended.

upon the death of that designated beneficiary.

These proposed regulations reflect the statutory delay of the effective date for governmental plans and collectively bargained plans. For this purpose, the determination of whether a plan is a collectively bargained plan is made in accordance with § 1.436–1(a)(5)(ii)(B) (relating to plans under which some participants are not members of collective bargaining units). The proposed regulations also reflect the exception for existing annuity contracts for which an irrevocable election as to the method and the amount of the annuity payments was made before December 20, 2019, as described in section 401(b)(4) of the SECURE Act.

2. Participants in Multiple Plans

These proposed regulations provide that if an employee is a participant in more than one plan, the plans in which the employee participates are not permitted to be aggregated for purposes of testing whether the distribution requirements of section 401(a)(9) are met. This rule is currently in § 1.401(a)(9)–8, Q&A–1, but is moved to § 1.401(a)(9)–1(a)(2) in these proposed regulations.

B. Section 1.401(a)(9)–2—Distributions Commencing During an Employee's Lifetime

Proposed § 1.401(a)(9)–2 provides rules for determining the required beginning date for distributions and whether distributions are treated as having begun during an employee's lifetime. These rules are based on the rules in the existing regulations, except that the rules have been updated to reflect the amendments to the required beginning date made by section 114 of the SECURE Act.

In accordance with section 114(a) of the SECURE Act, these proposed regulations generally provide that the required beginning date is April 1 of the calendar year following the later of (1) the calendar year in which the employee attains age 72, and (2) the calendar year in which the employee retires from employment with the employer maintaining the plan. These proposed regulations also provide that for an employee who was born before July 1, 1949, the required beginning date remains April 1 of the calendar year following the later of (1) the calendar year in which the employee attains age 70½, and (2) the calendar year in which the employee retires from employment with the employer maintaining the plan. However, if an employee is a 5-percent owner, then the required beginning date is April 1 of the calendar year following the calendar year in which the employee attains age 70½ or 72 (whichever required beginning date applies to the employee as determined using the employee's date of birth), and that required beginning date applies regardless of whether the employee has retired from employment with the employer maintaining the plan.

Section 114(d) of the SECURE Act provides that the amended definition of the required beginning date applies with respect to employees who attain age 70½ on or after January 1, 2020. This effective date provision could be interpreted to require the employee to survive until age 70½ in order to have the amended definition apply (that is, if the employee died before attaining age 70½, then the amended definition would not apply with respect to distributions to that employee's beneficiary, even if the employee would have attained age 70½ on or after January 1, 2020, had the employee survived). Instead, for ease of administration, these proposed regulations interpret the effective date language to apply the amendments made by section 114 of the SECURE Act to an employee who died before attaining age 70½ if the employee would have attained age 70½ on or after January 1, 2020 (that is, the employee's date of birth is on or after July 1, 1949). This interpretation also extends to a surviving spouse who is waiting to begin distributions pursuant to section 401(a)(9)(B)(iv). Thus, for example, if an employee who was born on June 1, 1952, died in 2018, and the employee's sole beneficiary is the employee's surviving spouse, then the surviving spouse may wait until 2024 (the calendar year in which the employee would have attained age 72) to begin receiving distributions.

C. Section 1.401(a)(9)–3—Death Before Required Beginning Date

Proposed § 1.401(a)(9)–3 provides rules for distributions if an employee dies before the employee's required beginning date. These rules are based on the rules in the existing regulations but are updated to reflect new section 401(a)(9)(H). Because section 401(a)(9)(H) applies only to defined contribution plans, the rules for distributions from defined benefit plans and defined contribution plans have been separated, with the rules for distributions from defined benefit plans set forth in proposed § 1.401(a)(9)–3(b) and the rules for distributions from defined contribution plans set forth in proposed § 1.401(a)(9)–3(c).

Section 401(a)(9)(H)(i) provides for a new 10-year distribution period in certain cases (10-year rule). Specifically, in the case of a defined contribution plan, if an employee who has a designated beneficiary dies before the employee's required beginning date, then section 401(a)(9)(B)(ii) is satisfied if the employee's entire interest is distributed by the end of the calendar year that includes the tenth anniversary of the employee's death. This 10-year rule is similar to the 5-year rule in the existing regulations (under which distributions may be delayed until the end of the fifth calendar year following the calendar year of the employee's death if the employee dies before the required beginning date) and permits distributions to be delayed until the end of the tenth calendar year following the calendar year of the employee's death if the employee dies before the required beginning date.

The 5-year rule is retained in these proposed regulations and continues to apply to a defined benefit plan. It also applies to a defined contribution plan if section 401(a)(9)(H) does not apply to the employee (which could occur if the employee does not have a designated beneficiary or if the employee died before the effective date of section 401(a)(9)(H) and the employee's designated beneficiary elected the 5-year rule).

These proposed regulations retain the rule that permits an employee's interest to be distributed over the designated beneficiary's life or life expectancy in accordance with section 401(a)(9)(B)(iii) (life expectancy payments rule). However, pursuant to section 401(a)(9)(H)(ii), in the case of a defined contribution plan, that rule is available only if the designated beneficiary is an eligible designated beneficiary as defined in section 401(a)(9)(E)(ii). Thus, in the case of a defined contribution plan, if the employee dies before the required beginning date and the employee's designated beneficiary is not an eligible designated beneficiary, the 10-year rule applies.

These proposed regulations also provide that in the case of a defined contribution plan, if the employee has a designated beneficiary who is an eligible designated beneficiary, the plan may provide either that the 10-year rule applies or that the life expectancy payments rule applies. Alternatively, the plan may provide the employee or the eligible designated beneficiary an election between the 10-year rule or the life expectancy payments rule. However, if a defined contribution plan does not include either of those optional provisions and the employee has an eligible designated beneficiary, the plan must provide for the life expectancy payments rule.

D. Section 1.401(a)(9)–4—Determination of the Designated Beneficiary

Proposed § 1.401(a)(9)–4 provides rules addressing the determination of the employee's beneficiary for purposes of section 401(a)(9) and these proposed regulations are substantially similar to the rules in the existing regulations. In addition to providing rules addressing the new definition of eligible designated beneficiary, these proposed regulations include rules that clarify and simplify the determination of a beneficiary for purposes of section 401(a)(9) in certain situations involving the use of a trust.

A designated beneficiary within the meaning of section 401(a)(9)(E)(i) generally is an individual designated under the plan as a beneficiary who is entitled to a portion of an employee's benefit, contingent on the employee's death or another specified event. If a beneficiary designated under the plan is a person other than an individual, then the employee is treated as not having a designated beneficiary (even if there is an individual who is designated as a beneficiary under the plan). However, if a beneficiary designated under the plan is a see-through trust as described in Section I.D.2 of this Explanation of Provisions, then certain beneficiaries of that trust are treated as the employee's beneficiaries under the plan rather than the trust. In addition, designating a person that is not an individual as a beneficiary under the plan does not cause the employee to be treated as not having a designated beneficiary to the extent separate account treatment applies with respect to that person as described in Section I.H of this Explanation of Provisions.

1. Eligible Designated Beneficiaries

These proposed regulations incorporate the new definition of eligible designated beneficiary in section 401(a)(9)(E)(ii). Specifically, an eligible designated beneficiary is a designated beneficiary who, as of the date of the employee's death, is (1) the surviving spouse of the employee, (2) a child of the employee who has not yet reached the age of majority, (3) disabled, (4) chronically ill, or (5) not more than 10 years younger than the employee.

a. Definition of Age of Majority

Section 401(a)(9)(E)(ii)(II) provides that if the employee's designated beneficiary, as of the date of the employee's death, is a child of the employee who has not yet reached the age of majority (as defined in section 401(a)(9)(F)), then that child is an eligible designated beneficiary. Section 1.401(a)(9)–6, A–15, of the existing regulations provides guidance regarding the application of section 401(a)(9)(F). That regulatory provision does not specify a particular age as a generally applicable age of majority, but provides that a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26.

The Treasury Department and the IRS have determined that it is necessary to revise the definition of age of majority from the definition used under the existing regulations (the pre-SECURE Act application of which is limited to defined benefit plans and rarely applied). As more plans are expected to apply an age of majority definition, plans may find it difficult to implement the existing standard under which the plan administrator obtains information about the education of an employee's child for purposes of applying section 401(a)(9)(H). Furthermore, because the definition of age of majority is intended to apply to all of an individual's accounts in defined contribution plans, which may be in multiple qualified plans and IRAs, the Treasury Department and the IRS have concluded that the definition, which will determine whether a designated beneficiary is an eligible designated beneficiary across plans and accounts, should not be a plan design choice. The potential for different plans to have different definitions would lead to confusion and complexity for individuals in planning and for their beneficiaries, as well as plan administrators and custodians, in determining payment streams. Accordingly, for purposes of section 401(a)(9)(E)(ii)(II) and (F), these proposed regulations provide that a child of the employee reaches the age of majority on that child's 21st birthday (which accommodates the age of majority definition in all of the States). However, as described in Section I.F of this Explanation of Provisions, the proposed regulations permit defined benefit plans that have used the prior definition of age of majority to retain that plan provision.

b. Definition of Disability

These proposed regulations provide rules for the determination of whether an individual is disabled for purposes of section 401(a)(9). Section 401(a)(9)(E)(ii)(III) applies the definition of disability under section 72(m)(7) for purposes of section 401(a)(9). Section 72(m)(7) provides a standard of disability based on whether an individual is unable to engage in substantial gainful activity. However, for individuals under age 18, that standard may be difficult to apply. Accordingly, if, as of the date of the employee's death, a beneficiary is younger than age 18, the proposed regulations apply a comparable standard that requires the beneficiary to have a medically determinable physical or mental impairment that results in marked and severe functional limitations, and that can be expected to result in death or to be of long-continued and indefinite duration.

These proposed regulations also provide a safe harbor for the determination of whether a beneficiary is disabled. Specifically, if, as of the date of the employee's death, the Commissioner of Social Security has determined that the individual is disabled within the meaning of 42 U.S.C. 1382c(a)(3), then that individual will be deemed to be disabled for purposes of section 401(a)(9).

Pursuant to section 401(a)(9)(E)(ii), the determination of whether a beneficiary is disabled is made as of the date of the employee's death. For example, if, as of the employee's death, the employee's designated beneficiary is the employee's 10-year-old child who is not disabled but who becomes disabled 5 years after the employee's death, then pursuant to section 401(a)(9)(E)(iii) and these proposed regulations, that child's later disability will not be taken into account, and that child will cease to be an eligible designated beneficiary on the child's 21st birthday.

c. Documentation Requirements for Disabled or Chronically Ill Status

These proposed regulations provide that, with respect to a beneficiary who is disabled or chronically ill as of the date of the employee's death, documentation of the disability or chronic illness must be provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the employee's death. If the designated beneficiary is chronically ill under any of the definitions in section 7702B(c)(2)(A) as of the date of the employee's death, the documentation must include a certification by a licensed health care practitioner (as defined in section 7702B(c)(4)) that the designated beneficiary is chronically ill. Additionally, in accordance with section 401(a)(9)(E)(ii)(IV), if the beneficiary is chronically ill under the definition in section 7702B(c)(2)(A)(i), then the documentation also must include a certification from a licensed health care practitioner that, as of the date of the certification, the individual is unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for an indefinite period that is reasonably expected to be lengthy in nature.

For a designated beneficiary who is an eligible designated beneficiary because, at the time of the employee's death, the designated beneficiary is the employee's minor child and that child also is disabled or chronically ill within the meaning of these proposed regulations, the designated beneficiary will continue to be treated as an eligible designated beneficiary after reaching the age of majority (on account of being disabled or chronically ill) only if these documentation requirements are timely met with respect to that designated beneficiary. Similarly, if the employee's designated beneficiary is the employee's surviving spouse and that spouse also is disabled or chronically ill at the time of the employee's death, then the surviving spouse will be treated as disabled or chronically ill for purposes of the applicable multi-beneficiary trust rules only if the documentation requirements are timely met with respect to the surviving spouse.

d. Other Rules Related to Eligible Designated Beneficiaries

These proposed regulations provide that, if an employee has more than one designated beneficiary and one of them is not an eligible designated beneficiary, then for purposes of section 401(a)(9), the employee generally is treated as not having an eligible designated beneficiary. In addition, these proposed regulations provide that if the surviving spouse is waiting to begin distributions until the year in which the employee would have attained age 72 and the surviving spouse dies before the beginning of that year, then the determination of whether the surviving spouse's designated beneficiary is an eligible designated beneficiary is made by substituting the surviving spouse for the employee (including for purposes of establishing the date as of which that determination is made). For example, a child of the surviving spouse is an eligible designated beneficiary if the child has not yet reached the age of majority as of the date of the surviving spouse's death.

2. Trust as Beneficiary

These proposed regulations retain the see-through trust concept in the existing regulations under which certain beneficiaries of a trust are treated as beneficiaries of the employee if the trust meets the requirements to be a see-through trust. Specifically, to be a see-through trust, the trust must meet the following requirements: (1) The trust is valid under state law or would be valid but for the fact that there is no corpus; (2) the trust is irrevocable or will, by its terms, become irrevocable upon the death of the employee; (3) the beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are identifiable; and (4) the specified documentation requirements are satisfied.

In response to issues raised in private letter ruling requests and comments submitted to the Treasury Department and the IRS, these proposed regulations provide additional guidance in determining which beneficiaries of the see-through trust are treated as beneficiaries of the employee.[5] These proposed rules are consistent with the examples that are in § 1.401(a)(9)–5, Q&A–7(c), of the existing regulations, but address many more fact patterns. The Treasury Department and the IRS intend for these more detailed rules to address many of the issues raised in comment letters and private letter ruling requests and expect that this more comprehensive and definitive guidance will minimize the need for taxpayers to request private letter rulings.

a. Determining Which See-Through Trust Beneficiaries Are Treated as Beneficiaries of the Employee

1. See-Through Trust Beneficiaries Taken Into Account

Generally, the proposed regulations provide that a beneficiary of a see-through trust is treated as a beneficiary of the employee if the beneficiary could receive amounts in the trust representing the employee's interest in the plan that are neither contingent upon nor delayed until the death of another trust beneficiary who does not predecease (and is not treated as having predeceased)[6] the employee.

Whether any other see-through trust beneficiary also is treated as a beneficiary of the employee depends upon whether the see-through trust is a conduit trust or accumulation trust. A conduit trust is defined in the proposed regulations as a see-through trust, the terms of which provide that all plan distributions will, upon receipt by the trustee, be paid directly to, or for the benefit of, specified beneficiaries. A see-through trust will not fail to be a conduit trust merely because the trust terms do not require an immediate distribution after the death of all of the specified beneficiaries described in the preceding sentence.

For example, if an employee names a conduit trust as the beneficiary of the employee's interest in a plan and the trust terms require all distributions from the plan to the trust during the surviving spouse's life to be distributed immediately to that surviving spouse, then the surviving spouse is treated as a beneficiary of the employee because the surviving spouse could receive amounts in the trust that are neither contingent upon nor delayed until the death of another trust beneficiary. In this case, if distributions have begun from the plan and the surviving spouse dies before the employee's entire interest is distributed, any beneficiary who could receive distributions from the conduit trust at the time of the surviving spouse's death is not treated as a beneficiary of the employee because that beneficiary's ability to receive amounts from the trust is contingent upon the death of the surviving spouse.

An accumulation trust is any see-through trust that is not a conduit trust, and under an accumulation trust, there are potentially more beneficiaries. A beneficiary of an accumulation trust is treated as a beneficiary of the employee if that beneficiary has a residual interest in the portion of the trust representing the employee's interest in the plan (that is, the beneficiary could receive amounts in the trust, representing the employee's interest in the plan, that were not distributed to individuals described in the first paragraph of this Section I.D.2.a.1). For example, assume an employee names a see-through trust as the sole beneficiary of the employee's interest in the plan. The terms of the see-through trust require the trustee to pay specified amounts from the trust to the employee's surviving spouse, and those specified amounts do not include the immediate payment of plan distributions made to the trust. Upon the spouse's death, the see-through trust is to terminate and the amounts remaining in the trust are to be paid to the employee's brother. The surviving spouse is treated as a beneficiary of the employee (because the surviving spouse could receive amounts in the see-through trust that are neither contingent upon nor delayed until the death of another trust beneficiary). Moreover, because not all distributions from the plan to the see-through trust are immediately distributed to a trust

[5] These proposed regulations provide for the determination of the trust beneficiaries that are treated as beneficiaries of the employee in § 1.401(a)(9)–4(f). In the existing regulations, these provisions were in § 1.401(a)(9)–5.

[6] For purposes of this rule, a beneficiary is treated as having predeceased the employee if the beneficiary is treated as predeceasing the employee pursuant to a simultaneous death provision or a qualified disclaimer.

beneficiary, the trust is an accumulation trust. As a result, the employee's brother is treated as a beneficiary of the employee because he has a residual interest in the see-through trust (that is, he could receive amounts in the trust representing the employee's interest in the plan that were not distributed to the surviving spouse).

2. Disregarded Beneficiaries of See-Through Trusts

These proposed regulations also provide for certain beneficiaries of a see-through trust to be disregarded as beneficiaries of the employee for purposes of section 401(a)(9), because they have only minimal or remote interests. Specifically, a see-through trust beneficiary is not treated as a beneficiary of the employee if that beneficiary could receive payments from the trust that represent the employee's interest in the plan only after the death of another trust beneficiary whose sole interest is a residual interest in the trust (as described in the preceding paragraph) and who did not predecease (and is not treated as having predeceased) the employee. Thus, using the example in the preceding paragraph, assume the see-through trust terms provide that if the employee's brother survives the employee but predeceases the surviving spouse, then the amounts remaining in the trust after the death of the surviving spouse are to be paid to a charity. In that case, the charity is disregarded as a beneficiary of the employee because the charity could receive only amounts in the trust that are contingent upon the death of the employee's brother, whose only interest was a residual interest (that is, an interest in the amounts remaining in the trust after the death of the surviving spouse). In contrast, the charity would be treated as a beneficiary of the employee if the brother could receive amounts in the trust not subject to any contingencies or contingent upon an event other than the death of the surviving spouse (such as the surviving spouse's remarriage).

These proposed regulations provide another exception under which a see-through trust beneficiary with a residual interest is disregarded as a beneficiary of the employee because the beneficiary would have only a minimal or remote interest in the trust. These proposed regulations provide that if the see-through trust terms require a full distribution of amounts in the trust representing the employee's interest in the plan to a specified individual described in the first paragraph of Section I.D.2.a.1 of this Explanation of Provisions by the later of: (1) The calendar year following the calendar year of the employee's death; and (2) the end of the tenth calendar year following the calendar year in which that specified individual attains the age of majority, then any other beneficiary whose sole entitlement to distributions is conditioned on the unlikely event that specified individual dies before the full distribution is required is disregarded as a beneficiary of the employee.

To illustrate this exception, assume an employee names a see-through trust as the sole beneficiary, the trust permits specified amounts to be paid to the employee's niece until the niece reaches age 31 (age of majority plus 10 years), and those specified amounts are not required to include the immediate payment of plan distributions made to the trust. The trust is scheduled to terminate with a full distribution of all trust assets to the niece when the niece reaches age 31, but if the niece dies before this scheduled termination, then the amounts remaining in the trust will be paid to the employee's sibling. In that case, the only beneficiary designated under the plan for purposes of section 401(a)(9) and these regulations is the employee's niece because the employee's sibling is disregarded under the exception described in the preceding paragraph. However, if the see-through trust terms do not require a full distribution of amounts in the trust representing the employee's interest in the plan until the niece reaches age 35, then this exception does not apply, and both the employee's niece and sibling are treated as beneficiaries designated under the plan for purposes of section 401(a)(9) and these regulations.

b. Identifiability of Trust Beneficiaries

These proposed regulations retain the requirement from the existing regulations that the employee's beneficiaries (including beneficiaries of a see-through trust) be identifiable, but modify the definition of identifiability in light of the enactment of section 401(a)(9)(H). Generally, trust beneficiaries are identifiable if it is possible to identify each person designated by the employee as eligible to receive a portion of the employee's interest in the plan through the trust. Under the proposed regulations, if an employee names a class of individuals as the beneficiary (such as the employee's grandchildren), the addition of another member of that class (for example, the birth of another grandchild) will not cause the trust to fail to meet the identifiability requirements.

These proposed regulations provide another exception to the general identifiability rule under which a trust will not fail to satisfy the identifiability requirements merely because an individual has a power of appointment with respect to a portion of the employee's interest in the plan. Specifically, these proposed regulations provide that if, by September 30 of the calendar year following the calendar year of the employee's death, the power is exercised in favor of one or more beneficiaries that are identifiable or is restricted so that any appointment made at a later time may only be made in favor of one or more identifiable beneficiaries, then all of those identifiable beneficiaries are taken into account as beneficiaries of the employee. If the power is not exercised by that September 30 in favor of one or more beneficiaries that are identifiable (and is not so restricted) then each taker in default (that is, each person who would be entitled to the portion subject to the power if that power is not exercised) is treated as a beneficiary of the employee.

These proposed regulations include a rule that applies when a beneficiary is added who was not initially taken into account in determining the employee's beneficiaries. Under this rule, if a beneficiary is added after September 30 of the calendar year following the calendar year of the employee's death (for example, if an individual exercises a power of appointment after that September 30), then the determination of whether there is no designated beneficiary because one of the employee's beneficiaries is not an individual, and the rules relating to multiple designated beneficiaries described in Sections I.D.1.d and I.E.3.d of this Explanation of Provisions must be applied taking into account the new beneficiary along with all of the beneficiaries that were taken into account before the addition of the new beneficiary. However, if the addition of the beneficiary would cause a full distribution of the employee's interest in the plan to be required pursuant to section 401(a)(9)(H) during the calendar year in which the beneficiary is added or in an earlier calendar year (and a full distribution would not have been required in the absence of the new beneficiary), then the proposed regulations provide that the full distribution is not required until the end of the calendar year following the calendar year in which the beneficiary was added.

To illustrate this rule, assume an employee named a see-through trust as the beneficiary of the employee's interest in the plan, the terms of the trust require the trustee to pay specified amounts from the trust to the employee's surviving spouse, and those specified amounts do not require the immediate payment of plan distributions made to the trust. In this case, the trust is an accumulation trust. The trust terms also provide the spouse with a testamentary power of appointment to name the beneficiary of any portion of the employee's interest in the plan that has not been distributed before the surviving spouse dies, but in the absence of an appointment, the employee's only child is entitled to that residual interest in the trust. If the power of appointment is not exercised by September 30 of the calendar year following the calendar year of the employee's death, then the trust does not fail to satisfy the identifiability requirements, and both the employee's surviving spouse and child are treated as beneficiaries of the employee. If, after that September 30, the surviving spouse exercises the power by naming the spouse's sibling as the beneficiary of the residual interest in the trust, then the employee's surviving spouse, the employee's child, and the spouse's sibling are all taken into account when applying the rules for multiple designated beneficiaries for each calendar year after the year during which the sibling is added as a beneficiary.

These proposed regulations also provide that a see-through trust will not fail to satisfy the identifiability requirements merely because the trust is subject to state law that permits the trust terms to be modified after the death of the employee (such as by a court reformation, through a decanting, or otherwise), thus permitting a change in the beneficiaries of the trust. If a beneficiary of a see-through trust is removed through a modification of the trust terms by September 30 of the calendar year following the calendar year of the employee's death, the proposed regulations provide that the beneficiary that was removed is disregarded as a beneficiary of the employee for purposes of section 401(a)(9) and these regulations. Similarly, if a beneficiary is added pursuant to such a modification, that beneficiary is taken into account as a beneficiary of the employee for purposes of section 401(a)(9) and these regulations. However, if a beneficiary is added pursuant to such a modification after that September 30, then the rules that apply to a beneficiary that is added pursuant to a power of appointment will apply also to a beneficiary that is added pursuant to the modification.

c. Applicable Multi-Beneficiary Trusts

These proposed regulations also provide guidance on a particular type of see-through trust defined in section 401(a)(9)(H)(v) as an applicable multi-beneficiary trust. Specifically, these proposed regulations define two types of applicable multi-beneficiary trusts. A type I applicable multi-beneficiary trust is an applicable multi-beneficiary trust, the terms of which provide that the trust is to be divided immediately upon the death of the employee into separate trusts for each beneficiary (as described in section 401(a)(9)(H)(iv)(I)). A type II applicable multi-beneficiary trust is an applicable multi-beneficiary trust, the terms of which provide that no individual other than a disabled or chronically ill eligible designated beneficiary has any right to the employee's interest in the plan until the death of all such eligible designated beneficiaries with respect to the trust (as described in section 401(a)(9)(H)(iv)(II)).

When dividing a type I applicable multi-beneficiary trust, one of the separate trusts could be a type II applicable multi-beneficiary trust. Thus, if a type I applicable multi-beneficiary trust is divided into separate trusts and one of the separate trusts satisfies the requirements to be a type II applicable multi-beneficiary trust, then the beneficiaries of that separate trust who are not disabled or chronically ill are disregarded as beneficiaries of the employee for purposes of section 401(a)(9) and these regulations. However, for any separate trust that does not satisfy the requirements to be a type II applicable multi-beneficiary trust, the beneficiaries of that separate trust are treated as beneficiaries of the employee for purposes of section 401(a)(9) and these regulations.

The Treasury Department and the IRS are aware of concerns related to the application of the amendments made by section 401 of the SECURE Act to section 401(a)(9) of the Code in the case of a trust with terms intended to ensure that a disabled individual who is a beneficiary of the trust remains eligible for means-tested government benefits. The Treasury Department and the IRS request comments on whether under applicable law a trust for a disabled individual (for example, a supplemental needs trust) could include terms providing that the disabled individual would lose the individual's interest in the trust in the event the interest would disqualify the individual for means-tested government benefits and still satisfy the requirements under the Code to be a type II applicable multi-beneficiary trust. Specifically, comments are requested on whether this type of provision may be included in a trust (thereby allowing a disabled individual to continue to qualify for means-tested government benefits), while not providing for trust payments to any other beneficiary until the death of the disabled individual.

3. Other Rules Related to Designated Beneficiaries.

a. Special Rules for Multiple Designated Beneficiaries

As described in the first paragraph of Section I.D.1.d of this Explanation of Provisions, these proposed regulations provide a general rule under which, if an employee has more than one designated beneficiary, and at least one of them is not an eligible designated beneficiary, then for purposes of section 401(a)(9), the employee is treated as not having an eligible designated beneficiary. As a result, the employee's interest must be distributed no later than the end of the tenth calendar year following the calendar year of the employee's death.

These proposed regulations include two exceptions to this general rule that allow an eligible designated beneficiary to use the life expectancy rule even if there is another designated beneficiary who is not an eligible designated beneficiary. The first exception is that if any of the employee's designated beneficiaries is a child of the employee who, as of the date of the employee's death, has not yet reached the age of majority, then the employee is still treated as having an eligible designated beneficiary (which allows payments to continue until 10 years after the child reaches the age of majority even if there are other designated beneficiaries who are not eligible designated beneficiaries). The second exception is if the see-through trust is a type II applicable multi-beneficiary trust, then the beneficiaries who either are disabled or chronically ill are treated as eligible designated beneficiaries without regard to whether any of the other trust beneficiaries are not eligible designated beneficiaries.

To illustrate these rules, if an employee who is a participant in a defined contribution plan names a see-through trust as the sole beneficiary of the employee's interest in the plan, and the trust beneficiaries are the employee's surviving spouse and the employee's adult child who is not disabled or chronically ill, then the employee is treated as not having an eligible designated beneficiary. As a result, the employee's entire interest must be distributed no later than 10 years after the employee's death. However, if there is another designated beneficiary who is the employee's child and who, as of the date of the employee's death, has not yet reached the age of majority, then, under the exception described in the preceding paragraph, the employee is treated as having an eligible designated beneficiary. In that second situation, if the trust is receiving annual distributions using the life expectancy rule, then a full distribution from the plan would not be required until ten years after the minor child reaches the age of majority.

b. Determining the Beneficiary for Purposes of Calculating the Required Minimum Distribution

These proposed regulations largely retain the rules of the existing regulations related to determining who is a beneficiary for purposes of section 401(a)(9), so that a person is a beneficiary if that person is a beneficiary designated under the plan as of the date of the employee's death and remains a beneficiary as of September 30 of the calendar year following the calendar year in which the employee died. For this purpose, a beneficiary need not be specified by name in order to be designated under the plan, provided the beneficiary is identifiable pursuant to the designation.

The existing regulations provide that a beneficiary is disregarded if certain events occur before September 30 of the calendar year following the calendar year in which the employee dies. In response to issues raised in private letter ruling requests and comments submitted to the Treasury Department and the IRS, these proposed regulations provide an exclusive list of events that permit a beneficiary to be disregarded. Specifically, the proposed regulations provide that if any of the following events occurs by September 30 of the calendar year following the calendar year in which the employee dies with respect to a person who was a beneficiary as of the employee's date of death, then that person will be disregarded in identifying the beneficiaries of the employee for purposes of section 401(a)(9): (1) The individual predeceases the employee; (2) the individual is treated as having predeceased the employee pursuant to a simultaneous death provision or pursuant to a qualified disclaimer that satisfies section 2518 and applies to the entire interest to which the beneficiary is entitled; or (3) the person receives the entire benefit to which the person is entitled.

To illustrate the rule in the preceding paragraph, if an individual makes a disclaimer satisfying section 2518 that applies to the individual's entire interest (including the requirement that the disclaimer be made within 9 months of the employee's death), that individual is not treated as a beneficiary for purposes of section 401(a)(9). However, if the disclaimer is executed more than 9 months after the employee's death, then that individual will not be disregarded for purposes of identifying the beneficiaries. As another example, assume a see-through trust is designated as a beneficiary of the employee's interest in the plan and that trust could be liable for expenses of administering and distributing the deceased employee's estate at death. In this case, the decedent's estate is treated as a beneficiary of the employee designated under the plan because some portion of the employee's interest in the plan may be used for the payment of those administration expenses, thus satisfying an obligation of the estate. However, if all of those expenses that could be paid from the employee's interest in the plan are paid by September 30 of the calendar year following the calendar year in which the employee died (so that by that date, the deceased employee's estate received the entire interest to which it was entitled), then the deceased employee's estate is disregarded, and the other beneficiaries of the see-through trust are considered beneficiaries of the employee.

E. Section 1.401(a)(9)–5—Required Minimum Distributions From Defined Contribution Plans

1. In General

Proposed § 1.401(a)(9)–5 retains the general method in the existing regulations by which a required minimum distribution from a defined contribution plan is calculated in any calendar year when an employee dies on or after the required beginning date or when an employee's eligible designated beneficiary is taking life expectancy payments after an employee dies before the required beginning date. Specifically, the required minimum distribution for a calendar year is determined by dividing the employee's account balance as of the end of the prior year by an applicable divisor. The existing regulations refer to the divisor as the applicable distribution period. However, in light of the amendments made by section 401 of the SECURE Act that may result in different distribution periods, these proposed regulations refer to the divisor as the applicable denominator. In addition to the requirement to take annual required minimum distributions, the proposed regulations implement those amendments by requiring that a full distribution of the remaining interest be taken in certain circumstances.

These proposed regulations also update the list of amounts of distributions and deemed distributions that are not taken into account in determining whether the required minimum distribution has been made for a calendar year. Under the proposed regulations, that list is implemented by a cross-reference to a list of amounts in § 1.402(c)–2(c)(3) (relating to amounts that are not treated as eligible rollover distributions). The effect of the new cross-reference is to add the following items to the list of amounts that are disregarded for purposes of determining the required minimum distribution from a defined contribution plan: Prohibited allocations that are treated as deemed distributions pursuant to section 409(p), distributions of premiums for health and accident insurance, deemed distributions with respect to a collectible pursuant to section 408(m), and distributions that are permissible withdrawals from an eligible automatic contribution arrangement within the meaning of section 414(w).

2. Distributions While the Employee Is Alive

These proposed regulations provide that, in determining the required minimum distribution for a distribution calendar year beginning while the employee is alive, the employee divides the account balance as of December 31 of the preceding calendar year by the employee's applicable denominator. Generally, the applicable denominator is determined using the Uniform Lifetime Table in § 1.401(a)(9)–9(c). However, if the employee's sole beneficiary is the employee's spouse who is more than 10 years younger than the employee, then the applicable denominator is determined using the Joint and Last Survivor Table in § 1.401(a)(9)–9(d) (providing for a longer payout period).

3. Distributions After the Employee's Death

a. Requirement To Satisfy Both Section 401(a)(9)(B)(i) and (ii) in the Case of an Employee Who Dies on or After the Required Beginning Date

Section 401(a)(9)(B)(i) provides rules that apply if an employee dies after benefits have commenced. While the 5-year rule under section 401(a)(9)(B)(ii) (expanded to a 10-year rule in certain cases by section 401(a)(9)(H)(i)(I)) generally applies if an employee dies before the employee's required beginning date, section 401(a)(9)(H)(i)(II) provides that section 401(a)(9)(B)(ii) applies whether or not distributions have commenced. Accordingly, if an employee dies after the required beginning date, distributions to the employee's beneficiary for calendar years after the calendar year in which the employee died must satisfy section 401(a)(9)(B)(i) as well as section 401(a)(9)(B)(ii). In order to satisfy both of these requirements, these proposed regulations provide for the same calculation of the annual required minimum distribution that was adopted in the existing regulations but with an additional requirement that a full distribution of the employee's entire interest in the plan be made upon the occurrence of certain designated events (discussed in section I.E.3.c. of this Explanation of Provisions).

b. Determination of Applicable Denominator

If an employee died on or after the required beginning date (or the employee died before the required beginning date and the employee's eligible designated beneficiary is taking life expectancy distributions in accordance with section 401(a)(9)(B)(iii) and these proposed regulations), then for calendar years after the calendar year in which the employee died, the applicable denominator generally is the remaining life expectancy of the designated beneficiary. The beneficiary's remaining life expectancy generally is calculated using the age of the beneficiary in the year following the calendar year of the employee's death, reduced by one for each subsequent calendar year.

However, as an exception to these general rules, if the employee's spouse is the employee's sole beneficiary, then the applicable denominator during the spouse's lifetime is the spouse's life expectancy (which reflects a recalculation in accordance with section 401(a)(9)(D)). In this case, for calendar years after the calendar year in which the spouse died, in determining the required minimum distribution to the spouse's beneficiary, the applicable denominator is the spouse's life expectancy calculated in the calendar year in which the spouse died, reduced by one for each subsequent calendar year.

If the employee has no designated beneficiary, then the applicable denominator is the employee's life expectancy calculated in the calendar year in which the employee died, reduced by one for each subsequent calendar year. This applicable denominator is also used in the case of an employee who died after the required beginning date and who was younger than the designated beneficiary.

c. Full Distribution Required in Certain Circumstances

In order to satisfy the 5-year rule of section 401(a)(9)(B)(ii) (or, if applicable, the exception to that rule in section 401(a)(9)(B)(iii), taking into account section 401(a)(9)(H), and (E)(iii)), these proposed regulations provide that, if an employee's interest is in a defined contribution plan to which section 401(a)(9)(H) applies, then the employee's entire interest in the plan must be distributed by the earliest of the following dates:

(1) The end of the tenth calendar year following the calendar year in which the employee died if the employee's designated beneficiary is not an eligible designated beneficiary;

(2) The end of the tenth calendar year following the calendar year in which the designated beneficiary died if the employee's designated beneficiary was an eligible designated beneficiary;

(3) The end of the tenth calendar year following the calendar year in which the beneficiary reaches the age of majority if the employee's designated beneficiary is the child of the employee who has not yet reached the age of majority as of the date of the employee's death; and

(4) The end of the calendar year in which the applicable denominator would have been less than or equal to one if it were determined using the beneficiary's remaining life expectancy, if the employee's designated beneficiary is an eligible designated beneficiary, and if the applicable denominator is determined using the employee's remaining life expectancy.

For example, if an employee died after the required beginning date with a designated beneficiary who is not an eligible designated beneficiary, then the designated beneficiary would continue to have required minimum distributions calculated using the beneficiary's life expectancy as under the existing regulations for up to nine calendar years after the employee's death. In the tenth year following the calendar year of the employee's death, a full distribution of the employee's remaining interest would be required.

Similarly, if an employee died after the required beginning date with an eligible designated beneficiary, then the eligible designated beneficiary would continue to have required minimum distributions calculated during the beneficiary's lifetime using the rules under the existing regulations. However, if the eligible designated beneficiary dies before the entire interest of the employee is distributed, then the beneficiary of that eligible designated beneficiary would continue taking annual distributions using the rules under the existing regulations for up to nine years after the death of the eligible designated beneficiary. In the tenth year following the calendar year of the eligible designated beneficiary's death, a full distribution of the employee's remaining interest would be required.

If the employee's designated beneficiary is a child of the employee who, as of the employee's death, has not yet reached the age of majority, then the child would have annual required minimum distributions calculated during the child's lifetime using the rules of the existing regulations. However, those distributions would be permitted to be paid for up to only nine years after the child reaches the age of majority with a full distribution of the employee's remaining interest required in the tenth year following the calendar year in which the child reaches the age of majority.

As another example, if an employee died at age 75 after the required beginning date and the employee's non-spouse eligible designated beneficiary was age 80 at the time of the employee's death, the applicable denominator would be determined using the employee's remaining life expectancy. However, these proposed regulations require a full distribution of the employee's remaining interest in the plan in the calendar year in which the applicable denominator would have been less than or equal to one if it were determined using the beneficiary's remaining life expectancy (even though the applicable denominator for determining the required minimum distribution is based on the remaining life expectancy of the employee). In this case, based on the beneficiary's life expectancy of 11.2 in the year of the employee's death, a full distribution would be required in the year the beneficiary reaches age 91 (because in the 11th calendar year after the employee's death the beneficiary's life expectancy would be less than or equal to one).

d. Multiple Designated Beneficiaries

These proposed regulations include a modified version of the general rule adopted in the existing regulations that applies if an employee has more than one designated beneficiary. Specifically, instead of determining the applicable denominator using the beneficiary with the shortest life expectancy, these proposed regulations provide that the applicable denominator is determined using the life expectancy of the oldest designated beneficiary. The proposed regulations provide that whether a full distribution is required also generally is determined using the oldest of the designated beneficiaries. For example, if an employee has multiple eligible designated beneficiaries who are born in the same calendar year, then full distribution of the employee's remaining interest generally is required by the tenth calendar year following the death of the oldest designated beneficiary.

These general rules for multiple designated beneficiaries are subject to certain exceptions. Under one exception, if the employee's beneficiary is a type II applicable multi-beneficiary trust, then only the disabled and chronically ill beneficiaries of the trust are taken into account in determining the oldest designated beneficiary. Thus, the ages of the other beneficiaries are disregarded in determining the applicable denominator, and the death of the last of the disabled or chronically ill trust beneficiaries triggers the 10-year payout requirement under section 401(a)(9)(H)(iii).

Under a second exception to the general rule, if any of the employee's designated beneficiaries is a child of the employee who has not yet reached the age of majority as of the date of the employee's death, then, in applying the requirement to make a full distribution by the tenth year following the death of the oldest eligible designated beneficiary, only the employee's children who are designated beneficiaries and who are under the age of majority at the employee's date of death are taken into account. Thus, in a situation involving one or more designated beneficiary children under the age of majority and one or more older designated beneficiaries, the death of an older designated beneficiary will not result in a requirement to pay a full distribution before the oldest child attains the age of majority plus ten years. In this case, a full distribution of the employee's remaining interest is not required until the tenth calendar year following the calendar year in which the oldest child of the employee who is a designated beneficiary and who had not attained the age of majority as of the employee's death reaches the age of majority (or, if earlier, the tenth calendar year following the calendar year of that child's death).

To illustrate these rules, assume an employee died at the age of 75 after the employee's required beginning date, and the employee named a see-through trust that is an accumulation trust as the employee's beneficiary under the plan. The terms of the trust require specified amounts to be paid to the employee's surviving spouse (who was age 74 at the time of the employee's death). Upon the spouse's death, the trust will terminate and the amounts remaining in the trust that have not been paid to the spouse will be paid to the employee's sibling (who was age 67 at the time of the employee's death). If the employee's sibling predeceases the surviving spouse, the amounts remaining in the trust that have not been paid to the surviving spouse will be paid to a charity. In this case, the charity is disregarded as a beneficiary of the employee (as described in Section I.D.2.a.2 of this Explanation of Provisions), and all of the other trust beneficiaries are eligible designated beneficiaries (a surviving spouse and a beneficiary who is not more than 10 years younger than the employee). Under these proposed regulations, required minimum distributions are made to the trust beginning in the calendar year after the calendar year of the employee's death using the surviving spouse's remaining life expectancy, because the surviving spouse is the oldest beneficiary of the employee. Upon the surviving spouse's death, annual distributions must continue to the trust using the surviving spouse's remaining life expectancy in the calendar year of the spouse's death, reduced by one in each subsequent calendar year. In addition, the entire interest of the employee must be distributed no later than the tenth calendar year following the calendar year of the spouse's death.

F. Section 1.401(a)(9)–6—Required Minimum Distributions From Defined Benefit Plans

Proposed § 1.401(a)(9)–6 provides rules for required minimum distributions from defined benefit plans and from annuity contracts that are annuitized to pay benefits under defined contribution plans. These rules are based on the existing regulations and are updated to reflect the amendments to section 401(a)(9) of the Code made by section 114 of the SECURE Act regarding the required beginning date and actuarial increases.

1. Rules Applicable to Defined Benefit Plans

a. Actuarial Increase for Employees Retiring After Age 70½

These proposed regulations address the actuarial increase required under section 401(a)(9)(C)(iii). Section 401(a)(9)(C)(iii) provides that, if section 401(a)(9)(C)(i)(II) applies to an employee and the employee retires in a calendar year after the calendar year in which the employee attains age 70½, then the employee's accrued benefit must be actuarially increased to take into account the period after age 70½ during which the employee was not receiving any benefits under the plan. Section 401(a)(9)(C)(ii)(I) provides that section 401(a)(9)(C)(i)(II) (providing a required beginning date based on the calendar year in which the employee retires) does not apply to an employee who is a 5-percent owner (as defined in section 416) for the plan year ending in the calendar year in which the employee attains age 72.

The proposed regulations reflect that the required actuarial increase under section 401(a)(9)(C)(iii) does not apply to a 5-percent owner. This is because the actuarial increase is limited to employees to whom section 401(a)(9)(C)(i)(II) applies (and section 401(a)(9)(C)(ii)(I) provides that section 401(a)(9)(C)(i)(II) generally does not apply in the case of an employee who is a 5-percent owner). Thus, the required actuarial increase applies to an employee other than a 5-percent owner who retires in a calendar year after the calendar year in which the employee attains age 70½.

These proposed regulations, like the existing regulations, reflect the exception from the requirements of section 401(a)(9)(C)(iii) provided under section 401(a)(9)(C)(iv) for governmental plans and church plans. Section 401(a)(9)(C)(iv) specifies that for purposes of section 401(a)(9), a church plan is a plan maintained by a church for church employees, and a church is any church within the meaning of section 3121(w)(3)(A) or any qualified church-controlled organization within the meaning of section 3121(w)(3)(B). These proposed regulations clarify that the determination of whether an employee is a church employee is made without regard to whether the employee would be considered an employee of a church under section 414(e)(3)(B). Therefore, a plan for the employees of a tax-exempt organization that is not a church or a qualified church-controlled organization must provide an actuarial increase for an employee who retires in a calendar year after the calendar year in which the employee reaches age 70½.

b. Interaction of Benefit Restrictions Under Section 436(d) and Minimum Distribution Requirements Under Section 401(a)(9)

Under section 436(d), a plan is required to provide certain limitations on accelerated benefit distributions. Under section 436(d)(1), if the plan's annual funding target attainment percentage (AFTAP) for a plan year is less than 60 percent, the plan must not make any prohibited payment (that is, a payment in excess of the monthly amount paid under a single life annuity or a payment for the purchase of an irrevocable commitment from an insurer to pay benefits) after the valuation date for the plan year. Under section 436(d)(2), if the plan sponsor is in bankruptcy proceedings, the plan may not pay any prohibited payment unless the plan's enrolled actuary certifies that the AFTAP of the plan is at least 100 percent. Under section 436(d)(3), if the plan's AFTAP for a plan year is at least 60 percent but is less than 80 percent, the plan must not pay any prohibited payment to the extent the payment exceeds the lesser of (1) 50 percent of the amount otherwise payable under the plan, and (2) the present value of the maximum Pension Benefit Guaranty Corporation guarantee with respect to a participant.

If an employee dies before the required beginning date and distributions are being made in accordance with section 401(a)(9)(B)(ii), then the entire interest of the employee generally must be distributed within 5 years of the employee's death (the 5-year rule). Because compliance with this requirement under section 401(a)(9)(B)(ii) may conflict with the requirements of section 436(d), these proposed regulations provide an exception to the 5-year rule so that a plan will not fail to comply with those requirements merely because payments by the plan are restricted by section 436(d). Under this provision, benefits that are required to be paid under the 5-year rule may extend past the section 401(a)(9)(B)(ii) deadline for full payment provided that the payments (1) start by the fifth year after the employee's death, and (2) are paid in a form that is as accelerated as permitted under section 436(d).

2. Rules Applicable to Annuity Contracts

a. Annuity Providers Must Be Licensed

Like the existing regulations, these proposed regulations provide that, for either a defined benefit plan or a defined contribution plan, the required minimum distribution rules may be satisfied through the purchase, with the employee's entire interest in the plan, of an annuity contract that provides periodic annuity payments for the employee's life (or the joint lives of the employee and beneficiary) or over a period certain. These proposed regulations add a rule that, for this purpose, the annuity contract must be issued by an insurance company licensed in the jurisdiction where the annuity is sold. However, pursuant to § 1.403(b)–6(e)(5), this rule does not apply to an annuity paid under a retirement income account that is described in section 403(b)(9).

b. Qualified Longevity Annuity Contracts

In 2014, the Treasury Department and the IRS amended the regulations under section 401(a)(9) in order to facilitate the purchase, under a defined contribution plan, of a deferred annuity that commences annuity payments at an advanced age. See 79 FR 37633. Those modifications apply to an annuity contract that satisfies certain requirements, including a requirement that distributions commence not later than age 85. Prior to annuitization, the value of this type of contract, referred to as a Qualified Longevity Annuity Contract (QLAC), is excluded from the account balance used to determine required minimum distributions.

Section 1.401(a)(9)–6, A–17(a)(4), of the existing regulations provides that a QLAC may not make available any commutation benefit, cash surrender value, or other similar feature. These proposed regulations would change this rule so that this prohibition applies only after the required beginning date. This change is proposed so that if a plan's investment options include a series of target date funds to which the relief under Notice 2014–66, 2014–46 I.R.B. 820 applies,[7] those target date funds would be permitted to include QLACs among their assets.

3. Other Rules

a. Increasing Payments

Like the existing regulations, these proposed regulations generally provide that all payments under a defined benefit plan or annuity contract must be nonincreasing, subject to a number of exceptions. These proposed regulations retain the exceptions in the existing final regulations and add to the list of circumstances under which annuity payments under a defined benefit plan may increase. Under the proposed regulations, annuity payments may increase as a result of the resumption of benefits that were suspended pursuant to section 411(a)(3)(B) (for a retiree whose benefits were suspended on account of employment after commencement of benefits and then resume after the suspension of benefits ends). In addition, annuity payments may increase as a result of the resumption of benefits that were suspended pursuant to section 418E (for an insolvent plan) or section 432(e)(9) (for a participant or beneficiary of a plan in critical and declining status whose benefits have been suspended under section 432(e)(9), if the suspension of benefits consists of a temporary reduction of benefits or if suspended benefits resume because of a failure to meet the conditions of section 432(e)(9)(C)).

The existing regulations provide a number of exceptions under which payments from annuity contracts purchased from insurance companies may increase, and certain of these exceptions apply only if the total future expected payments under the contract exceed the total value being annuitized. These proposed regulations make a minor modification to the rules to clarify the calculation of the total future expected payments and the total value being annuitized. Specifically, these proposed regulations modify the determination of the total value being annuitized by providing that the total value is calculated as of the date on which the contract is annuitized. This modification (under which this determination is made as of the date on which the contract is annuitized, rather than the date on which payments on the annuitized contract begin as specified in § 1.401(a)(9)–6, A–14(e)(1)(i) of the existing regulations), will have an effect only in situations in which the contract is annuitized on a date earlier than the date on which payments begin. In addition, these proposed regulations update the examples illustrating these rules to reflect the mortality rates in § 1.401(a)(9)–9.

These proposed regulations also provide three additional exceptions to the nonincreasing payments requirement for annuities issued by insurance companies that apply without regard to a comparison of the total future expected payments and the total value being annuitized. Two of these exceptions have been added because

[7] Notice 2014–66 provides relief under section 401(a)(4) to enable plans to provide lifetime income by offering, as investment options, a series of target date funds that include deferred annuities among their assets, even if some of the target date funds within the series are available only to older participants.

commentors have identified that certain policy features are popular with policyholders and these features do not have a material impact on the amount of expected payments. First, these proposed regulations allow an annuity contract to provide a final payment upon the death of the employee that does not exceed the excess of total value being annuitized over the total of payments before the death of the employee. Second, these proposed regulations allow an annuity contract to offer a short-term acceleration of payments, under which up to one year of annuity payments are paid in advance of when those payments were scheduled to be made. In addition, to facilitate compliance, these proposed regulations provide a third exception that allows an annuity contract to provide an acceleration of payments that is required to comply with section 401(a)(9)(H).

b. Payments to Children

These proposed regulations amend the existing rules governing when, pursuant to section 401(a)(9)(F), payment of an employee's accrued benefit to a child may be treated as if the payments were made to a surviving spouse. These rules are the same as under the existing regulations except, as discussed in Section I.D.1.a of this Explanation of Provisions, these proposed regulations specify that an individual reaches the age of majority for purposes of sections 401(a)(9)(E)(ii)(II) and (F) on that individual's 21st birthday.

Under these proposed regulations, a plan's terms that define the age of majority that were adopted on or before February 24, 2022 and met the requirements of § 1.401(a)(9)–6, A–15 of the existing regulations are not required to be amended to reflect this change, and the plan may continue to use that plan definition of the age of majority for purposes of section 401(a)(9)(F). Moreover, because a governmental plan is subject only to a reasonable, good faith standard in complying with the rules of section 401(a)(9), the plan terms of a governmental plan may use a definition of the age of majority for purposes of section 401(a)(9)(F) that meets the requirements of § 1.401(a)(9)–6, A–15 of the existing regulations, even if the plan terms that define age of majority are adopted after that date.

G. Section 1.401(a)(9)–7—Rollovers and Transfers

Proposed § 1.401(a)(9)–7 retains the rollover and transfer rules that are in the existing regulations.

H. Section 1.401(a)(9)–8—Special Rules

Proposed § 1.401(a)(9)–8 provides special rules applicable to satisfying the minimum distribution requirement. These include separate account treatment for beneficiaries, the definition of spouse (updated to include the post-*Obergefell* regulations under § 301.7701–18), application of the qualified domestic relations order (QDRO) rules, and the applicability of elections under section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97–248, 96 Stat. 324 (1982) (TEFRA).

The proposed regulation generally retains the separate account rules applicable to beneficiaries after the death of the employee that were adopted in the existing regulations, including the rule that prohibits separate application of section 401(a)(9) to separate interests in a trust. However, in light of the new applicable multi-beneficiary trust rules provided in section 401(a)(9)(H)(iv), these proposed regulations provide an exception to that prohibition that would permit separate application of section 401(a)(9) to the separate subtrusts of a type I applicable multi-beneficiary trust.

These proposed regulations also clarify the rules under which section 401(a)(9) is applied separately with respect to the separate interests of each of the employee's beneficiaries under a plan, provided that the separate accounting requirements are satisfied. Those separate accounting requirements include:

(1) Any post-death distribution with respect to a beneficiary's interest must be allocated to the separate account of that beneficiary;

(2) All post-death investment gains and losses, contributions, and forfeitures, for the period prior to the establishment of the separate accounts must be allocated on a pro rata basis in a reasonable and consistent manner among the separate accounts; and

(3) The investment return with respect to the investments held in the separate accounts that were established for the separate interests of the beneficiaries must be allocated to those separate accounts.

However, if the separate accounting requirements are not satisfied until after the end of the calendar year following the calendar year of the employee's death, then, for calendar years after the separate accounting requirements are satisfied: (1) The required minimum distribution is determined without regard to the separate accounts; (2) the aggregate distribution is allocated among the beneficiaries based on each beneficiary's share of the total remaining balance of the employee's interest; and (3) the allocated share for each beneficiary must be distributed to each respective beneficiary.

I. Section 1.401(a)(9)–9—Life Expectancy and Distribution Period Tables

These proposed regulations include minor changes to existing provisions of § 1.401(a)(9)–9 to conform the terminology in that section to the new terminology used in proposed § 1.401(a)(9)–5. For example, references to the ''applicable distribution period'' have been changed to refer to the ''applicable denominator.''

II. Section 402(c) Regulations

These proposed regulations provide updates to existing rules of § 1.402(c)–2 that reflect statutory amendments made to section 402(c) since the regulations were issued in 1995. Those amendments are described in the Background section of this Preamble under the heading ''Section 402(c)—Rollovers.''

A. Exclusion From Income of Amount Rolled Over

These proposed regulations provide that, if an employee receives an eligible rollover distribution and rolls it over to any eligible retirement plan within 60 days of the distribution (including any amount withheld under section 3405(c)), then the distribution generally is not includible in gross income. However, if any portion of the eligible rollover distribution is rolled over to a Roth IRA and the distribution is not from a designated Roth account, that portion is includible in the taxpayer's gross income but generally is not subject to the 10-percent additional tax under section 72(t).

B. Definition of Eligible Rollover Distribution and Eligible Retirement Plan

These proposed regulations update the definition of *eligible rollover distribution* to include the portion of the distribution that constitutes the employee's investment in the contract and provide that, pursuant to section 402(c)(4)(C), an eligible rollover distribution does not include any distribution made on account of hardship. These proposed regulations also provide that a rollover distribution may be a 60-day rollover, a direct rollover described in section 401(a)(31), or the repayment of a distribution that is treated as a rollover pursuant to another statutory provision (such as the repayment of a qualified birth or adoption distribution that is treated as a rollover pursuant to section 72(t)(2)(H)(v)(III)).

These proposed regulations also update the list of amounts of distributions and deemed distributions that are not eligible rollover distributions. Specifically, the proposed regulation adds that a deemed distribution with respect to a collectible pursuant to section 408(m) is not treated as an eligible rollover distribution.

These proposed regulations provide that, pursuant to section 402(c)(8)(B), an eligible retirement plan is: (1) An IRA; (2) a qualified plan (including an employee's trust described in section 401(a) that is exempt from taxation under section 501(a), an annuity plan under section 403(a) or an annuity contract under 403(b)); or (3) an eligible deferred compensation plan under section 457(b) maintained by an employer described in section 457(e)(1)(A) (such as a State or local government). Pursuant to section 402(c)(10), an eligible deferred compensation plan under section 457(b) is an eligible retirement plan only if it separately accounts for amounts rolled into the plan. Furthermore, an eligible rollover distribution from a designated Roth account under section 402A may be rolled over only to another designated Roth account or to a Roth IRA.

C. Special Rules Related to Eligible Rollover Distributions

1. Distributions That Include Basis

In accordance with section 402(c)(2), these proposed regulations provide that if an eligible rollover distribution includes an amount that is allocable to the employee's basis (that is, the employee's investment in the contract), then additional rules will apply if it is not rolled over to an IRA. Specifically, if the rollover is to a qualified plan or annuity contract described in section 403(b), then the rollover must be made through a direct trustee-to-trustee transfer. In addition, the portion of a distribution that is allocable to an employee's basis may not be rolled over to an eligible deferred compensation plan described in section 457(b).

These proposed regulations also provide that if an eligible rollover distribution includes an amount that is allocable to an employee's basis, and only a portion of that distribution is rolled over, then the portion that is rolled over is treated as first consisting of the portion of the distribution that is not allocable to the employee's basis.

2. Distributions That Include Property

These proposed regulations reflect the rules in section 402(c)(1)(C) and provide that, generally, if an eligible rollover distribution is made in the form of property, then that property may be rolled over. In accordance with section 402(c)(6)(A), if that property is sold after being distributed, then the proceeds of the sale may be rolled over (up to the fair market value of the property at the time of the sale), but only if the distribution otherwise satisfies the requirements to be an eligible rollover distribution. The Treasury Department and the IRS request comments on whether there are additional issues under section 402(c)(6) concerning the treatment of the proceeds of the sale of the property (including in situations in which the proceeds of the sale exceed the fair market value of the property at the time of the distribution) that should be addressed in future guidance.

3. Extensions of and Exceptions to the 60-Day Rollover Deadline

These proposed regulations provide for certain extensions of and exceptions to the 60-day deadline by which an eligible rollover distribution must be rolled over to an eligible retirement plan. Specifically, the regulations adopt the requirements of section 402(c)(3)(B), which provides that the Commissioner may waive the 60-day deadline if the failure to waive that requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual with respect to that requirement. In addition, the proposed regulations provide that the 60-day period does not include any period during which the amount transferred to the employee is a frozen deposit described in section 402(c)(7)(B), and does not end earlier than 10 days after that amount ceases to be a frozen deposit. The proposed regulations also clarify that in the case of a repayment of a distribution treated as a rollover (such as a qualified disaster distribution), the repayment timing requirements in the statutory provision giving rise to that treatment take precedence over the otherwise applicable 60-day period. Finally, these proposed regulations also move the rules for the section 402(c)(3)(C) exception to the 60-day deadline for a rollover of a QPLO amount from § 1.402(c)–3 to § 1.402(c)–2(g).

D. Distributions to Beneficiaries

1. General Rules

These proposed regulations provide that, generally, a distributee other than the employee or the employee's surviving spouse is not permitted to roll over a distribution from a qualified plan. Pursuant to section 402(c)(9), these proposed regulations provide that a surviving spouse may roll over an employee's interest in the plan to an IRA or a qualified plan. In the case of a spousal rollover to a qualified plan, the amount rolled over is treated as the spouse's own interest in the receiving plan and not as the decedent's interest in the distributing plan. Accordingly, with respect to the amount rolled over to a qualified plan, section 401(a)(9) is satisfied under the rules of section 401(a)(9)(A) (applicable to distributions to employees) and not section 401(a)(9)(B) (applicable to distributions to beneficiaries following the employee's death).

These proposed regulations provide that a designated beneficiary who is not a spouse may elect, under section 402(c)(11), to have any portion of a distribution that fits within the definition of an eligible rollover distribution transferred via a direct trustee-to-trustee transfer to an IRA established for the purpose of receiving that distribution. If that transfer is made pursuant to section 402(c)(11), the distribution is treated as an eligible rollover distribution; the IRA is treated as an inherited account or annuity (as defined in section 408(d)(3)(C), so that distributions from the inherited IRA are not eligible to be rolled over); and the IRA is subject to section 401(a)(9)(B) (other than section 401(a)(9)(B)(iv)).

In determining whether a distribution to a beneficiary is an eligible rollover distribution, the portion of the distribution that constitutes a required minimum distribution under section 401(a)(9) must be determined. The proposed regulations set forth rules for making this determination that are similar to the rules adopted in Notice 2007–7, Q&A–17 and Q&A–19, but are expanded to apply to both spouse and non-spouse beneficiaries.

These proposed regulations provide that, generally, if an employee dies before the required beginning date, then the amount of a distribution to a beneficiary that is treated as a required minimum distribution under section 401(a)(9) (and thus is not an eligible rollover distribution) is determined based on whether the 5-year rule, 10-year rule, or life expectancy rule (or, in the case of a defined benefit plan, the annuity payment rule) applies. Regardless of which rule applies, no portion of a distribution made in the year of the employee's death is treated as a required minimum distribution under section 401(a)(9).

If the 5-year rule applies, then no amount distributed before the fifth calendar year after the calendar year of the employee's death is treated as a required minimum distribution. In the fifth calendar year after the calendar year of the employee's death, the entire amount distributed in that year is treated as a required minimum distribution (and thus is not an eligible rollover distribution). Similarly, if the 10-year rule applies, then, generally, no amount distributed before the tenth calendar year after the calendar year of the employee's death is treated as a required minimum distribution. In the tenth calendar year after the calendar year of the employee's death, the entire amount distributed in that year is treated as a required minimum distribution (and thus is not an eligible rollover distribution).

If the employee dies on or after the required beginning date or if the life expectancy rule applies (or, in the case of a defined benefit plan, the annuity payment rule applies), then, in the first distribution calendar year for the beneficiary and for each subsequent year, the amount treated as a required minimum distribution (and thus is not an eligible rollover distribution) is determined in accordance with the rules described in Sections I.F and I.G of this Explanation of Provisions. In this situation, if the employee dies before receiving the distribution, the amount that would have otherwise been a required minimum distribution for the employee in the calendar year of the employee's death is treated as a required minimum distribution with respect to any distribution to a beneficiary of the employee. A similar rule applies if the employee's beneficiary dies before receiving the distribution for the calendar year of the beneficiary's death, so that the amount that would have otherwise been a required minimum distribution for the employee's beneficiary in the calendar year of that beneficiary's death is treated as a required minimum distribution with respect to any distribution to a beneficiary of the employee's beneficiary.

These proposed regulations provide an exception for a beneficiary to whom the 5-year rule or 10-year rule applies if that beneficiary makes the election described in Section IV of this Explanation of Provisions to have the life expectancy rule (or annuity payment rule) apply to amounts in the IRA that receives the distribution (rather than the 5-year rule or 10-year rule that applied under the distributing plan). This exception ensures that if a beneficiary makes that election, then the portion of a distribution from the plan that is a required minimum distribution is determined in a consistent manner with respect to all amounts to which the life expectancy rule or annuity payment rule apply.

2. Special Rule for Certain Distributions to Surviving Spouses

These proposed regulations also provide for a special rule that limits the ability of a surviving spouse to use the 5-year rule or the 10-year rule to defer distributions beyond the otherwise required beginning date and then, after that date, commence annual distributions. This rule, which applies in limited circumstances, is used to determine, with respect to a distribution to the employee's surviving spouse to whom the 5-year rule or 10-year rule applies, the portion of that distribution that is treated as a required minimum distribution under section 401(a)(9) (and thus is not an eligible rollover distribution). This special rule, which treats a portion of a distribution made before the last year of the 5-year or 10-year period (whichever applies to the spouse) as a required minimum distribution, applies if: (1) The distribution is made in or after the calendar year the surviving spouse attains age 72; and (2) the surviving spouse rolls over some or all of the distribution to an eligible retirement plan under which the surviving spouse is not treated as the beneficiary of the employee. For example, this special rule applies when an employee dies at age 67, the spouse (who is age 68) elects the 10-year rule, the spouse takes a distribution in the 6th calendar year following the employee's death (the calendar year in which the spouse is age 74 and the employee would have been age 73) and the surviving spouse is rolling over a part of that distribution to the spouse's own IRA (but the rule would not apply if the distribution occurred in the calendar year that the surviving spouse attained age 71 or an earlier year).

Under this special rule, the portion of the distribution that is treated as a required minimum distribution is the cumulative total, over a span of years, of the hypothetical required minimum distribution for each year had the life expectancy rule applied (or, in the case of a defined benefit plan, had the annuity payment rule applied), reduced by any amounts actually distributed to the surviving spouse during that span of years. The span of years begins with the first applicable year (defined as the later of the calendar year in which the surviving spouse reaches age 72 and the calendar year in which the employee would have reached age 72) and ends in the year of distribution.

In calculating the hypothetical required minimum distributions from a defined contribution plan for a calendar year under this special rule, the proposed regulations provide that an adjusted account balance is used. The adjusted account balance for a calendar year is determined by reducing the account balance that normally would be used to determine the required minimum distribution for that year by the excess (if any) of: (1) The sum of the hypothetical required minimum distributions beginning with the first applicable year and ending with the calendar year preceding the calendar year of the determination, over (2) the distributions actually made to the surviving spouse during those calendar years.

III. Section 403(b) Regulations

A. Section 1.403(b)–6(e)—Minimum Required Distributions for Eligible Plans

These proposed regulations amend § 1.403(b)–6(e) to conform that paragraph (which sets forth the required minimum distribution rules for a section 403(b) contract) to the changes made to section 401(a)(9) under the SECURE Act. For example, pursuant to the change in the required beginning date under section 114 of the SECURE Act, these proposed regulations change the reference to age 70½ in the current regulations to the required beginning date as determined under § 1.401(a)(9)–2(b).

These proposed regulations also amend § 1.403(b)–6(e) to provide that the exception from the applicability of section 401(a)(9)(H) for qualified annuities provided in section 401(b)(4) of the SECURE Act applies in the case of a section 403(b)(9) retirement income account even if a commercial annuity (as defined in section 3405(e)(6) of the Code) is not used, provided that all of the other requirements for the qualified annuity exception are satisfied.

B. Request for Comments Regarding Required Minimum Distributions From Section 403(B) Plans

Under § 1.403(b)–6(e), the required minimum distribution rules applicable to IRAs apply to section 403(b) contracts, and, in general, the required minimum distribution rules for section 403(b) plans are applied in accordance with § 1.408–8. Thus, for example, under § 1.403(b)–6(e)(7), a required minimum distribution owed with respect to one section 403(b) contract of an individual is permitted to be distributed from another section 403(b) contract of the same individual. Although IRA trustees are required, on Form 5498, *IRA Contribution Information,* to report to the IRS and provide to IRA owners certain information regarding required minimum distributions (such as whether a required minimum distribution is due for a year and the account balance on which the required minimum distribution will be based), Notice 2002–27, 2002–18 I.R.B. 814, provides that no reporting is required with respect to required minimum distributions from section 403(b) contracts. Accordingly, a section 403(b) plan is neither required to automatically make a required minimum distribution for a participant nor required to inform the IRS or the participant that a required minimum distribution is due or the account balance on which the distribution is based.

The required minimum distribution rules applicable to section 403(b) contracts were developed before 2007 when the section 403(b) regulations were issued and made section 403(b) plans more like employer-sponsored qualified plans rather than IRAs, including requiring employers to adopt a written plan document that describes employer responsibilities under the plan. The existing regulations also provide that section 403(b) plans determine the required beginning date in accordance with the rules applicable to qualified plans rather than the rules applicable to IRAs, and that the qualified plan rules related to the purchase of a QLAC apply to section 403(b) plans rather than the corresponding IRA rules. These proposed regulations further treat a section 403(b) plan like a qualified plan in that the distributions or deemed distributions not taken into account in determining the required minimum distribution for a calendar year are the distributions or deemed distributions described in the qualified plan rules rather than the IRA rules.

The Treasury Department and the IRS are considering additional changes to the required minimum distribution rules for section 403(b) plans so that they more closely follow the required minimum distribution rules for qualified plans. For example, under this approach, each section 403(b) plan (like each qualified plan) would be required to make required minimum distributions calculated with respect to that plan (rather than rely on the employee to request distributions from another plan in an amount that satisfies the requirement). These changes would treat similar employer-sponsored plans consistently and may facilitate compliance with the required minimum distribution rules.

The Treasury Department and the IRS request comments on these possible changes to the required minimum distribution rules for section 403(b) plans, including: (1) Any administrative concerns; (2) any differences between the structure or administration of section 403(b) plans and of qualified plans that should be taken into account in applying the required minimum distribution rules for qualified plans to section 403(b) plans; and (3) any transition rules that would ease the implementation of these possible changes.

IV. Section 1.408–8—Distribution Requirements for IRAs

These proposed regulations amend § 1.408–8 (which sets forth the required minimum distribution rules for IRAs) to implement the changes made to section 401(a)(9) under the SECURE Act. For example, pursuant to the change in the required beginning date under section 114 of the SECURE Act, these proposed regulations change the references to age 70½ in the current regulations to the required beginning date as determined under § 1.401(a)(9)–2(b)(3). This change reflects that the IRA owner's required beginning date is April 1 of the calendar year after the calendar year in which the individual attains age 72 (or 70½ in the case of an IRA owner born before July 1, 1949). These proposed regulations also provide that the owner of a Roth IRA is not required to begin distributions during the owner's lifetime (consistent with existing § 1.408A–6, Q&A–14 and 15).

These proposed regulations incorporate the rules in Notice 2007–7, Q&A–17 and 19 (relating to the carryover of the method of determining required minimum distributions from a distributing plan to a receiving IRA when a beneficiary is making a transfer described in section 402(c)(11)). In addition, these proposed regulations extend those rules to provide comparable treatment to a surviving spouse in light of the extension of the 5-year period to a 10-year period pursuant to section 401(a)(9)(H). Specifically, these proposed regulations provide that, if an employee dies before the employee's required beginning date after designating the employee's spouse as a beneficiary, and the surviving spouse rolls over a distribution from the qualified plan to an IRA in the name of the decedent, then any distribution method that was elected under the qualified plan also will apply to the IRA that receives the rollover. The same rule applies in the case of an IRA owner who dies before the required beginning date (so that, if the surviving spouse rolls over a distribution to an IRA in the name of the decedent, then the distribution method that was elected under the distributing IRA will also apply to the IRA that receives the rollover).

These proposed regulations also provide an exception to the rules in the preceding paragraph providing for comparable treatment between surviving spouse beneficiaries and other designated beneficiaries. Under this exception, a surviving spouse, to whom the 5-year rule or 10-year rule applies and who rolls over a distribution from a plan (or an IRA) to an IRA in the decedent's name, may elect to have distributions from the IRA that receives the rollover be subject to the life expectancy rule (rather than the 5-year rule or 10-year rule). The deadline for making this election is the deadline that would have applied for an election between the 5-year rule (or 10-year rule) and the life expectancy rule (or annuity payment rule) had the distributing plan provided for an election between those rules by the beneficiary. As described in Section II.D. of this Explanation of Provisions, if this election is made, then the portion of a distribution that is treated as the required minimum distribution also will be calculated using the life expectancy rule (or annuity payment rule).

The proposed rules described in the preceding two paragraphs also are proposed to apply to a non-spouse beneficiary who is making a transfer described in section 402(c)(11) (incorporating the rules of Notice 2007–7, Q&A–17 and 19). Thus, for example, if an eligible designated beneficiary elects the 10-year rule and, in the seventh calendar year after the calendar year of the employee's death, that beneficiary elects for a distribution to be made in the form of a direct transfer of the employee's interest under the plan to an IRA in the name of the decedent, then the amount transferred nevertheless must be distributed by the end of the tenth calendar year following the calendar year of the employee's death. However, if the distribution is made by the end of the calendar year following the year the employee dies, then the beneficiary would be permitted to make an election to have the life expectancy rule apply under the IRA.

These new rules relating to the distribution method of the receiving IRA do not apply to a surviving spouse when that spouse is rolling over a distribution to the spouse's own account in a qualified plan or to the spouse's own IRA (because distributions would then be made in accordance with section 401(a)(9)(A) instead of section 401(a)(9)(B)). In that case, these proposed regulations provide that the amount of the distribution treated as a required minimum distribution, and thus not eligible to be rolled over, is determined in accordance with § 1.402(c)–2(j) (including the new rule under which in certain circumstances a spouse who elects the 10-year rule is required to treat a portion of any distribution as a required minimum distribution under the life expectancy rule).

To coordinate with these rules, the proposed regulations provide a deadline for the election under which a surviving spouse may elect to treat a decedent's IRA as the spouse's own. Specifically, a surviving spouse must make that election by the later of (1) the end of the calendar year in which the surviving spouse reaches age 72, and (2) the end of the calendar year following the calendar year of the IRA owner's death. This new deadline should not disrupt the normal application of the election, because the primary purpose for not making an immediate election is for a surviving spouse who has not yet reached age 59½ to take advantage of the section 72(t)(2)(A)(ii) exception to the 10% additional income tax on early withdrawals made by a beneficiary. If the surviving spouse were to miss the deadline provided for in these proposed regulations, that surviving spouse still would be permitted to roll over distributions to the spouse's own IRA but would be subject to the special rule on the catch-up of hypothetical required minimum distributions described in Section II.D of this Explanation of Provisions.

These proposed regulations also provide that any beneficiary (including a non-individual beneficiary) may aggregate IRAs that are inherited from the same decedent when determining the amount that is a required minimum distribution. Thus, for example, if a trust is the beneficiary of two IRAs that are inherited from the same decedent, the trustee may aggregate those IRAs when determining the amount that is a required minimum distribution and take that aggregate amount from either one of the IRAs.

V. Section 1.457–6(d)—Minimum Required Distributions for Eligible Plans

These proposed regulations delete a sentence in § 1.457–6(d) that describes section 401(a)(9), because the sentence refers to age 70½, and is no longer accurate following the amendment to the definition of required beginning date under section 114 of the SECURE Act.

VI. Section 54.4974–1—Excise Tax on Accumulations in Qualified Retirement Plans

These proposed regulations provide amendments to § 54.4974–2 (which is renumbered as § 54.4974–1) to conform the rules to the changes made to section 401(a)(9) under the SECURE Act. For example, the rules for determining the required minimum distribution when the 5-year rule applies are expanded to include rules for determining the required minimum distribution when the 10-year rule applies.

These proposed regulations also provide two situations in which an automatic waiver of the excise tax applies, one of which is based on the automatic waiver in the existing regulation. The first situation in which the automatic waiver applies is when: (1) The employee (or in the case of an IRA, the IRA owner) died before the required beginning date; (2) the payee is an eligible designated beneficiary who did not make an affirmative election to use the life expectancy rule but otherwise is subject to the life expectancy rule pursuant to a plan provision or the regulatory default provision that applies in the absence of a plan provision; (3) the payee did not satisfy the required minimum distribution requirements; and (4) the payee elects for the employee's or IRA owner's entire interest to be distributed under the 10-year rule. In that case, once the payee elects the 10-year rule, the payee's required minimum distribution in the tenth calendar year following the calendar year of the employee's or IRA owner's death is the entire account balance.

The second situation in which an automatic waiver applies is in the case of an individual who had a minimum distribution requirement in a calendar year and died in that calendar year before satisfying that minimum distribution requirement. In this situation, the individual's beneficiary must satisfy the minimum distribution requirement by the end of that calendar year. However, if that beneficiary fails to satisfy the minimum distribution requirement in that calendar year, then the excise tax for the failure to take the distribution is automatically waived provided that the beneficiary satisfies that requirement no later than that beneficiary's tax filing deadline (including extensions thereof).

Applicability Dates

Amended §§ 1.401(a)(9)–1 through 1.401(a)(9)–9, 1.403(b)–6(e), and 1.408–8 are proposed to apply for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2022. Amended § 1.402(c)–2 is proposed to apply for distributions on or after January 1, 2022. Amended § 54.4974–1 is proposed to apply for taxable years beginning on or after January 1, 2022. For the 2021 distribution calendar year, taxpayers must apply the existing regulations, but taking into account a reasonable, good faith interpretation of the amendments made by sections 114 and 401 of the SECURE Act. Compliance with these proposed regulations will satisfy that requirement.

Special Analyses

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the regulations will not have a significant economic impact on a substantial number of small entities. These proposed regulations do not impose new compliance burdens and are not expected to result in economically meaningful changes in behavior relative to the existing regulations. The election described in § 1.401(a)(9)–3(b)(4)(iii) and (c)(5)(iii) is expected to be an unusual occurrence for small entities because few individuals with benefits in retirement plans maintained by small entities are likely to make these elections. In the case of § 1.401(a)(9)–4(e)(7), when determining whether a designated beneficiary is disabled or chronically ill, the reporting burden is primarily on the designated beneficiary rather than the plan sponsor. In the case of § 1.401(a)(9)–4(h), when determining required minimum distributions in cases in which a plan participant wishes to designate a trust as beneficiary of the participant's benefit, the reporting burden is primarily on the plan participant, or the trustee of the trust named as beneficiary, to supply information rather than on the entity maintaining the retirement plan. In addition, the number of participants per plan to whom the burden applies is likely to be small. In § 1.403(b)–3(e)(6)(ii), the recordkeeping burden with respect to section 403(b) contracts under which the pre-1987 account balance must be maintained only applies to issuers and custodians of those contracts, which generally are not small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. Treasury and IRS invite comments on the impact of these regulations on small entities. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Paperwork Reduction Act

The collection of information related to these proposed regulations under sections 401(a)(9) and 403(b) has been reviewed in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and approved by the Office of Management and Budget under control number 1545–0047.

Comments concerning the collection of information and the accuracy of estimated average annual burden and suggestions for reducing this burden should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the burden associated with this collection of information must be received by April 25, 2022.

Comments

Before the proposed amendments are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *www.regulations.gov* or upon request

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Drafting Information

The principal authors of these proposed regulations are Brandon M. Ford and Laura B. Warshawsky, of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of the proposed regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are proposed to be amended as follows:

PART 1—INCOME TAX

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805, unless otherwise noted.

■ **Par. 2.** Revise sections 1.401(a)(9)–0 through 1.401(a)(9)–8 to read as follows:

§ 1.401(a)(9)–0 Required minimum distributions; table of contents.

This table of contents lists the regulations relating to required minimum distributions under section 401(a)(9) of the Internal Revenue Code as follows:

(h) Documentation requirements for trusts.
(1) General rule.
(2) Required minimum distributions while employee is still alive.
(3) Required minimum distributions after death.
(4) Relief for discrepancy between trust instrument and employee certifications or earlier trust instruments.

§ 1.401(a)(9)–5 Required minimum distributions from defined contribution plans.

(a) General rules.
(1) In general.
(2) Distribution calendar year.
(3) Time for distributions.
(4) Minimum distribution incidental benefit requirement.
(5) Annuity contracts.
(6) Impact of additional distributions in prior years.
(b) Determination of account balance.
(1) General rule.
(2) Adjustment for subsequent allocations.
(3) Adjustment for subsequent distributions.
(4) Exclusion for QLAC contract.
(5) Treatment of rollovers.
(c) Determination of applicable denominator during employee's lifetime.
(1) General rule.
(2) Spouse is sole beneficiary.
(d) Applicable denominator after employee's death.
(1) Death on or after the employee's required beginning date.
(2) Death before an employee's required beginning date.
(3) Remaining life expectancy.
(e) Distribution of employee's entire interest required.
(1) In general.
(2) 10-year limit for designated beneficiary who is not an eligible designated beneficiary.
(3) 10-year limit following death of eligible designated beneficiary.
(4) 10-year limit after minor child of the employee reaches age of majority.
(5) Life expectancy limit for older eligible designated beneficiaries.
(f) Rules for multiple designated beneficiaries.
(1) Determination of applicable denominator.
(2) Determination of when entire interest is required to be distributed.
(g) Treatment of nonvested amounts.
(h) Distributions taken into account.

§ 1.401(a)(9)–6 Required minimum distributions for defined benefit plans and annuity contracts.

(a) Defined benefit plans.
(1) In general.
(2) Definition of life annuity.
(3) Annuity commencement.
(4) Single-sum distributions.
(5) Death benefits.
(6) Separate treatment of separate identifiable components.
(7) Additional guidance.
(b) Application of incidental benefit requirement.
(1) Life annuity for employee.
(2) Joint and survivor annuity.
(3) Period certain and annuity features.
(4) Deemed satisfaction of incidental benefit rule.
(c) Period certain annuity.
(1) Distributions commencing during the employee's life.
(2) Distributions commencing after the employee's death.
(d) Use of annuity contract.
(e) Treatment of additional accruals.
(1) General rule.
(2) Administrative delay.
(f) Treatment of nonvested benefits.
(g) Requirement for actuarial increase.
(1) General rule.
(2) Nonapplication to 5-percent owners.
(3) Nonapplication to governmental and church plans.
(h) Amount of actuarial increase.
(1) In general.
(2) Actuarial equivalence basis.
(3) Coordination with section 411 actuarial increase.
(i) [Reserved].
(j) Distributions restricted pursuant to section 436.
(1) General rule.
(2) Payments restricted under section 436(d)(3).
(3) Payments restricted under section 436(d)(1) or (2).
(k) Treatment of early commencement.
(1) General rule.
(2) Joint and survivor annuity, nonspouse beneficiary.
(3) Limitation on period certain.
(l) Early commencement for surviving spouse.
(m) Determination of entire interest under annuity contract.
(1) General rule.
(2) Entire interest.
(3) Exclusions.
(4) Examples.
(n) Change in annuity payment period.
(1) In general.
(2) Reannuitization.
(3) Conditions.
(4) Examples.
(o) Increase in annuity payments.
(1) General rules.
(2) Eligible cost of living index.
(3) Additional permitted increases for certain annuity contracts purchased from insurance companies.
(4) Additional permitted increases for all annuity contracts purchased from insurance companies.
(5) Additional permitted increases for annuity payments from a qualified trust.
(6) Definitions.
(7) Examples.
(p) Payments to children.
(1) In general.
(2) Age of majority.
(q) Qualifying longevity annuity contract.
(1) Definition of qualifying longevity annuity contract.
(2) Limitations on premiums.
(3) Payments after death of the employee.
(4) Rules of application.

§ 1.401(a)(9)–7 Rollovers and transfers.

(a) Treatment of rollover from distributing plan.
(b) Treatment of rollover by receiving plan.
(c) Treatment of transfer under transferor plan.
(1) Generally not treated as distribution.
(2) Account balance decreased after transfer.
(d) Treatment of transfer under transferee plan.
(e) Treatment of spinoff or merger.

§ 1.401(a)(9)–8 Special rules.

(a) Use of separate accounts
(1) Separate application of section 401(a)(9) for beneficiaries.
(2) Separate accounting requirements.
(b) Application of consent requirements.
(c) Definition of spouse.
(d) Treatment of QDROs.
(1) Continued treatment of spouse.
(2) Separate accounts.
(3) Other situations.
(e) Application of section 401(a)(9) pending determination of whether a domestic relations order is a QDRO is being made.
(f) Application of section 401(a)(9) when insurer is in state delinquency proceedings.
(g) In-service distributions required to satisfy section 401(a)(9).
(h) TEFRA section 242(b) elections.
(1) In general.
(2) Application of section 242(b) election after transfer.
(3) Application of section 242(b) election after rollover.
(4) Revocation of section 242(b) election.

§ 1.401(a)(9)–9 Life expectancy and distribution period tables.

(a) In general.
(b) Single Life Table.
(c) Uniform Life Table.
(d) Joint and Last Survivor Table.
(e) Mortality rates.
(f) Applicability dates.
(1) In general.
(2) Application to life expectancies that may not be recalculated.

§ 1.401(a)(9)–1 Minimum distribution requirement in general.

(a) *Plans subject to minimum distribution requirement*—(1) *In general.* Under section 401(a)(9), all stock bonus, pension, and profit-sharing plans qualified under section 401(a) and annuity contracts described in section 403(a) are subject to required minimum distribution rules. See this section and §§ 1.401(a)(9)–2 through 1.401(a)(9)–9 for the distribution rules applicable to these plans. Under section 403(b)(10), annuity contracts and custodial accounts described in section 403(b) are subject to required minimum distribution rules. See § 1.403(b)–6(e) for the distribution rules applicable to these annuity contracts and custodial accounts. Under section 408(a)(6) and 408(b)(3), individual retirement accounts and individual retirements annuities (collectively, IRAs) are subject to required minimum distribution rules. See § 1.408–8 for the minimum distribution rules applicable to IRAs and § 1.408A–6 for the minimum distribution rules applicable to Roth IRAs under section 408A. Under section

457(d)(2), eligible deferred compensation plans described in section 457(b) for employees of tax-exempt organizations or employees of State and local governments are subject to required minimum distribution rules. See § 1.457–6(d) for the minimum distribution rules applicable to those eligible deferred compensation plans.

(2) *Participant in multiple plans.* If an employee is a participant in more than one plan, the plans in which the employee participates are not permitted to be aggregated for purposes of testing whether the distribution requirements of section 401(a)(9) are met. Thus, the distribution of the benefit of the employee under each plan must separately meet the requirements of section 401(a)(9). For this purpose, a plan described in section 414(k) is treated as two separate plans, a defined contribution plan to the extent benefits are based on an individual account and a defined benefit plan with respect to the remaining benefits.

(3) *Governmental plans.* A governmental plan (within the meaning of section 414(d)), or an eligible governmental plan described in § 1.457–2(f), is treated as having complied with section 401(a)(9) if the plan complies with a reasonable, good faith interpretation of section 401(a)(9). Thus, the terms of a governmental plan that reflect a reasonable, good faith interpretation of section 401(a)(9) do not have to provide that distributions will be made in accordance with this section and §§ 1.401(a)(9)–2 through 1.401(a)(9)–9. Similarly, a governmental plan may apply the rules of section 401(a)(9)(F) using the rules of 26 CFR 1.401(a)(9)–6, Q&A–15 (revised as of April 1, 2021).

(b) *Statutory effective date*—(1) *In general.* The distribution rules of section 401(a)(9) generally apply to all account balances and benefits in existence on or after January 1, 1985.

(2) *Applicability date for section 401(a)(9)(H)*—(i) *General effective date.* Except as provided in this paragraph (b), section 401(a)(9)(H) applies with respect to employees who die on or after January 1, 2020. However, in the case of a governmental plan (as defined in section 414(d)), section 401(a)(9)(H) applies with respect to employees who die on or after January 1, 2022.

(ii) *Delayed applicability date for collectively bargained plans*—(A) *General rule.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before December 20, 2019 (the date of enactment of the Further Consolidated Appropriations Act, Pub. L. 116–94, 133 Stat. 2534 (2019)), section 401(a)(9)(H) generally applies with respect to employees who die on or after January 1, 2022.

(B) *Earlier application if agreements terminate.* Notwithstanding paragraph (b)(2)(ii)(A) of this section, section 401(a)(9)(H) applies to a plan maintained pursuant to one or more collective bargaining agreements with respect to employees who die in 2020 or 2021 if—

(*1*) The year in which the employee dies begins after the date on which the last of the collective bargaining agreements described in paragraph (b)(2)(ii)(A) of this section terminates (determined without regard to any extension thereof to which the parties agreed on or after December 20, 2019), and

(*2*) Section 401(a)(9)(H) would apply with respect to the employee under the rules of paragraph (b)(2)(i) of this section.

(C) *Rules of application.* For purposes of this paragraph (b)(2)(ii)—

(*1*) A plan is treated as maintained pursuant to one or more collective bargaining agreements only if the plan constitutes a collectively bargained plan under the rules of § 1.436–1(a)(5)(ii)(B), and

(*2*) Any plan amendment made pursuant to a collective bargaining agreement that amends the plan solely to conform to the requirements of section 401(a)(9)(H) is not treated as a termination of the collective bargaining agreement.

(iii) *Applicability upon death of designated beneficiary*—(A) *In general.* Except as otherwise provided in this paragraph (b)(2)(iii), if an employee who died before the effective date described in paragraph (b)(2)(i) or (ii) of this section (whichever applies to the plan) has only one designated beneficiary and that beneficiary dies on or after that effective date, then, upon the death of the designated beneficiary, section 401(a)(9)(H) applies with respect to any beneficiary of the employee's designated beneficiary. Section 401(b)(5) of Division O of the Further Consolidated Appropriations Act (known as the SECURE Act), provides that, if an employee dies before the effective date, then a designated beneficiary of an employee is treated as an eligible designated beneficiary. Accordingly, once the rules of section 401(a)(9)(H) apply with respect to the employee's designated beneficiary, the rules of section 401(a)(9)(H)(iii) (requiring full distribution of the employee's interest within 10 years after the death of an eligible designated beneficiary) apply upon the designated beneficiary's death.

(B) *Employee with multiple designated beneficiaries.* If an employee described in paragraph (b)(2)(iii)(A) of this section has more than one designated beneficiary, then whether section 401(a)(9)(H) applies is determined based on the date of death of the oldest of the employee's designated beneficiaries. Thus, section 401(a)(9)(H) will apply upon the death of the oldest of the employee's designated beneficiaries if that designated beneficiary is still alive on or after the effective date of section 401(a)(9)(H) for the plan as determined under the rules of paragraph (b)(2)(i) or (ii) of this section.

(C) *Surviving spouse of the employee dies before employee's required beginning date.* If an employee described in paragraph (b)(2)(iii)(A) of this section dies before the employee's required beginning date and the employee's surviving spouse is waiting to begin distributions until the year for which the employee would have been required to begin distributions pursuant to section 401(a)(9)(B)(iv), then, in applying the rules of this paragraph (b)(2)(iii), the surviving spouse is treated as the employee. Thus, for example, if an employee with a required beginning date of April 1, 2025, names the employee's surviving spouse as the sole beneficiary of the employee's interest in the plan, both the employee and the employee's surviving spouse die before the effective date of section 401(a)(9)(H) for the plan, and that spouse's designated beneficiary dies on or after that effective date, then section 401(a)(9)(H) applies with respect to the surviving spouse's designated beneficiary upon the death of that designated beneficiary.

(iv) *Qualified annuity exception*—(A) *In general.* Section 401(a)(9)(H) does not apply to a commercial annuity (as defined in section 3405(e)(6))—

(*1*) That is a binding annuity contract in effect as of December 20, 2019;

(*2*) Under which payments satisfy the requirements of 26 CFR 1.401(a)(9)–1 through 1.401(a)(9)–9 (revised as of April 1, 2020); and

(*3*) That satisfies the irrevocability requirements of paragraph (b)(2)(iv)(B) of this section.

(B) *Irrevocability requirements applicable to annuity contract.* A contract satisfies the requirements of this paragraph (b)(2)(iv)(B) if the employee has made an irrevocable election before December 20, 2019, as to the method and amount of annuity payments to the employee and any designated beneficiary.

(3) *Examples.* The following examples illustrate the effective date requirements of this paragraph (b).

(i) *Example 1.* Employer M maintains a defined contribution plan, Plan X. Employee A died in 2017, at the age of 68, and designated A's 40-year-old non-disabled, non-chronically ill son, B, as the sole beneficiary of A's interest in Plan X. Pursuant to a plan provision in Plan X, B elected to take distributions over B's life expectancy under section 401(a)(9)(B)(iii). B dies in 2024, after the effective date of section 401(a)(9)(H). Because section 401(b)(5) of the SECURE Act treats B as an eligible designated beneficiary, the rules of section 401(a)(9)(H)(iii) apply to B's beneficiaries. Therefore, A's remaining interest in Plan X must be distributed by the end of 2034 (within 10 years of B's death).

(ii) *Example 2.* The facts are the same as in *Example 1* in paragraph (b)(3)(i) of this section except that B died in 2019. Because A's designated beneficiary died before the effective date of section 401 of the SECURE Act, the rules of section 401(a)(9)(H) do not apply to B's beneficiaries.

(iii) *Example 3.* The facts are the same as in *Example 1* in paragraph (b)(3)(i) of this section except that, pursuant to a provision in Plan X, B elected the 5-year rule under section 401(a)(9)(B)(ii). Accordingly, A's entire interest is required to be distributed by the end of 2022. Because A died before January 1, 2020, section 401(a)(9)(H) does not apply with respect to B. Therefore, section 401(a)(9)(H)(i)(I) does not extend B's election to a 10-year period. Although B's election requires A's entire interest to be distributed by the end of 2022, the enactment of section 401(a)(9)(I)(iii)(II) (permitting disregard of 2020 when the 5-year period applies) permits distribution of A's entire interest in the plan to be delayed until the end of 2023.

(iv) *Example 4.* The facts are the same as in *Example 1* in paragraph (b)(3)(i) of this section except that A designates a see-through trust that satisfies the requirements of § 1.401(a)(9)–4(f)(2) as the sole beneficiary of A's interest in Plan X. All of the trust beneficiaries are alive as of January 1, 2020. The oldest of the trust beneficiaries, C, dies in 2022. Because section 401(b)(5) of the SECURE Act treats C as an eligible designated beneficiary, the rules of section 401(a)(9)(H)(iii) apply to the other trust beneficiaries. Thus, if the death of the oldest beneficiary is not disregarded under the rules of § 1.401(a)(9)–5(f)(2)(ii), A's remaining interest in Plan X must be distributed by the end of 2032 (within 10 years of C's death).

(v) *Example 5.* The facts are the same as in *Example 4* in paragraph (b)(3)(iv) of this section except that C dies in 2019. Because the oldest designated beneficiary died before January 1, 2020, the rules of section 401(a)(9)(H) do not apply to any of the other trust beneficiaries.

(vi) *Example 6.* The facts are the same as in *Example 1* in paragraph (b)(3)(i) of this section except that B elected to purchase an annuity that pays over B's lifetime with a 15-year certain period starting in the calendar year following the calendar year of A's death. Because B died after the effective date of section 401(a)(9)(H), the rules of section 401(a)(9)(H)(iii) apply, and accordingly, the annuity may not provide distributions any later than the end of 2034.

(c) *Required and optional plan provisions*—(1) *Required provisions.* In order to satisfy section 401(a)(9), a plan must include the provisions described in this paragraph (c)(1) reflecting section 401(a)(9). First, a plan generally must set forth the statutory rules of section 401(a)(9), including the incidental death benefit requirement in section 401(a)(9)(G). Second, a plan must provide that distributions will be made in accordance with this section and §§ 1.401(a)(9)–2 through 1.401(a)(9)–9. A plan document also must provide that the provisions reflecting section 401(a)(9) override any distribution options in a plan inconsistent with section 401(a)(9). A plan also must include any other provisions reflecting section 401(a)(9) that are prescribed by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d) of this chapter.

(2) *Optional provisions.* A plan may also include optional provisions governing plan distributions that do not conflict with section 401(a)(9). For example, a defined benefit plan may include a provision described in § 1.401(a)(9)–3(b)(4)(ii) (requiring that the 5-year rule apply to an employee who has a designated beneficiary). Similarly, a defined contribution plan may provide for an election by an eligible designated beneficiary as described in § 1.401(a)(9)–3(c)(5)(iii).

(d) *Regulatory effective date*—This section and §§ 1.401(a)(9)–2 through 1.401(a)(9)–9 apply for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2022. For earlier calendar years, the rules of 26 CFR 1.401(a)(9)–1 through 1.401(a)(9)–9 (revised as of April 1, 2021) apply.

§ 1.401(a)(9)–2 Distributions commencing during an employee's lifetime.

(a) *Distributions commencing during an employee's lifetime*—(1) *In general.* In order to satisfy section 401(a)(9)(A), the entire interest of each employee must be distributed to the employee not later than the required beginning date, or must be distributed, beginning not later than the required beginning date, over the life of the employee or the joint lives of the employee and a designated beneficiary or over a period not extending beyond the life expectancy of the employee or the joint life and last survivor expectancy of the employee and the designated beneficiary. Under section 401(a)(9)(G), lifetime distributions must satisfy the incidental death benefit requirements of § 1.401–1(b)(1).

(2) *Amount required to be distributed for a calendar year.* The amount required to be distributed for each calendar year in order to satisfy section 401(a)(9)(A) and (G) generally depends on whether the amount to be distributed is from an individual account under a defined contribution plan or is an annuity payment from a defined benefit plan or under an annuity contract. For the method of determining the required minimum distribution in accordance with section 401(a)(9)(A) and (G) from an individual account under a defined contribution plan, see § 1.401(a)(9)–5. For the method of determining the required minimum distribution in accordance with section 401(a)(9)(A) and (G) in the case of annuity payments from a defined benefit plan or under an annuity contract, see § 1.401(a)(9)–6.

(3) *Distributions commencing before required beginning date*—(i) *In general.* Lifetime distributions made before the employee's required beginning date for calendar years before the employee's first distribution calendar year, as defined in § 1.401(a)(9)–5(a)(2)(ii), need not be made in accordance with section 401(a)(9). However, if distributions commence before the employee's required beginning date under a particular distribution option (such as in the form of an annuity) and, under the terms of that distribution option, distributions to be made for the employee's first distribution calendar year (or any subsequent calendar year) will fail to satisfy section 401(a)(9), then the distribution option fails to satisfy section 401(a)(9) at the time distributions commence.

(ii) *Date distributions are treated as having begun.* Except as otherwise provided in paragraph (a)(3)(iii) of this section and § 1.401(a)(9)–6(j), distributions to the employee are not treated as having begun in accordance with section 401(a)(9)(A)(ii) until the employee's required beginning date, as determined in accordance with paragraph (b)(1), (2), or (3) of this section, whichever applies to the employee. The preceding sentence applies even if the employee has received distributions before the employee's required beginning date (either pursuant to plan terms that require distributions to begin by an earlier date or pursuant to the employee's election). Thus, even if payments have been made before the employee's required beginning date, the rules of § 1.401(a)(9)–3 will apply if the employee dies before that date. For example, if A is an employee who retires in 2023, the calendar year A attains age 71, and begins receiving installment distributions from a profit-sharing plan over a period not exceeding the joint life and last survivor expectancy of A and A's spouse, benefits are not treated as having begun in accordance with section 401(a)(9)(A)(ii) until April 1, 2025 (the April 1 following the calendar year in which A attains age 72). Consequently, if A dies before April 1, 2025 (A's required beginning date), distributions after A's death must be made in accordance with section 401(a)(9)(B)(ii) or (iii) and (iv) and § 1.401(a)(9)–3 (addressing payments to beneficiaries in cases in which required distributions have not begun), and not section 401(a)(9)(B)(i) (addressing payments to beneficiaries in cases in which required distributions have begun). This is the case without regard to whether, before A's death, the plan distributed the minimum distribution for the first distribution calendar year (as defined in § 1.401(a)(9)–5(a)(2)(ii)).

(iii) *Exception for uniform required beginning date.* If a plan provides, in accordance with paragraph (b)(4) of this section, that the required beginning date for purposes of section 401(a)(9) for all employees is April 1 of the calendar year following the calendar year described in paragraph (b)(1)(i) or (b)(2)(i)(A) of this section (whichever applies to the employee), without regard to whether the employee is a 5-percent owner, then an employee who dies on or after the required beginning date determined under the plan terms is treated as dying after distributions have begun in accordance with section 401(a)(9)(A)(ii) (even if the employee dies before the April 1 following the calendar year in which the employee retires).

(4) *Distributions after death.* Section 401(a)(9)(B)(i) provides that, if the distribution of the employee's interest has begun in accordance with section 401(a)(9)(A)(ii), and the employee dies before the employee's entire interest has been distributed to the employee, the remaining portion of the employee's interest must be distributed at least as rapidly as under the distribution method being used under section 401(a)(9)(A)(ii) as of the date of the employee's death. For the method of determining the required minimum distribution in accordance with section 401(a)(9)(B)(i) from an individual account under a defined contribution plan, see § 1.401(a)(9)–5. In the case of annuity payments from a defined benefit plan or under an annuity contract, see § 1.401(a)(9)–6.

(b) *Determination of required beginning date*—(1) *General rule.* Except as otherwise provided in this paragraph (b), the employee's required beginning date (within the meaning of section 401(a)(9)(C)) is April 1 of the calendar year following the later of—

(i) The calendar year in which the employee attains age 72; and

(ii) The calendar year in which the employee retires from employment with the employer maintaining the plan.

(2*) Employees born before July 1, 1949*—(i) *Prior law general rule.* With respect to an employee who was born before July 1, 1949, except as otherwise provided in this paragraph (b), the employee's required beginning date is April 1 of the calendar year following the later of—

(A) The calendar year in which the employee attains age 70½; and

(B) The calendar year in which the employee retires from employment with the employer maintaining the plan.

(ii) *Attainment of age 70½.* An employee attains age 70½ as of the date six calendar months after the 70th anniversary of the employee's birth. For example, if the date of birth of an employee who retired in 2013 was June 30, 1943, the 70th anniversary of the employee's birth was June 30, 2013 and the employee attained age 70½ on December 30, 2013. Consequently, the employee's required beginning date was April 1, 2014. However, if the employee's date of birth was July 1, 1943, the 70th anniversary of the employee's birth was July 1, 2013. The employee attained age 70½ on January 1, 2014, and the employee's required beginning date was April 1, 2015.

(3) *Required beginning date for 5-percent owner*—(i) *In general.* In the case of an employee who was born on or after July 1, 1949, and who is a 5-percent owner, the employee's required beginning date is April 1 of the calendar year following the calendar year described in paragraph (b)(1)(i) of this section. In the case of an employee who was born before July 1, 1949, and who is a 5-percent owner, the employee's required beginning date is April 1 of the calendar year following the calendar year described in paragraph (b)(2)(i)(A) of this section.

(ii) *Definition of 5-percent owner.* For purposes of section 401(a)(9), a 5-percent owner is an employee who is a 5-percent owner (as defined in section 416) with respect to the plan year ending in the calendar year described in paragraphs (b)(1)(i) or (b)(2)(i)(A) of this section, whichever applies to the employee.

(iii) *No applicability to governmental plan or church plan.* This paragraph (b)(3) does not apply in the case of a governmental plan (within the meaning of section 414(d)) or a church plan (as described in § 1.401(a)(9)–6(g)(3)).

(4) *Uniform required beginning date.* A plan is permitted to provide that the required beginning date for purposes of section 401(a)(9) for all employees is April 1 of the calendar year following the calendar year described in paragraphs (b)(1)(i) or (b)(2)(i)(A) of this section (whichever applies to the employee), without regard to whether the employee is a 5-percent owner.

§ 1.401(a)(9)–3 Death before required beginning date.

(a) *In general.* Except as otherwise provided in §§ 1.401(a)(9)–2(a)(3) and 1.401(a)(9)–6(j), if an employee dies before the employee's required beginning date (and thus before distributions are treated as having begun in accordance with section 401(a)(9)(A)(ii)), then—

(1) In the case of a defined benefit plan, distributions are required to be made in accordance with paragraph (b) of this section, and

(2) In the case of a defined contribution plan, distributions are required to be made in accordance with paragraph (c) of this section.

(b) *Distribution requirements in the case of a defined benefit plan*—(1) *In general.* Distributions from a defined benefit plan are made in accordance with this paragraph (b) if the distributions satisfy either paragraph (b)(2) or (3) of this section, whichever applies with respect to the employee. The determination of whether paragraph (b)(2) or (3) of this section applies is made in accordance with paragraph (b)(4) of this section.

(2) *5-year rule.* Except as otherwise provided in § 1.401(a)(9)–6(j) (relating to defined benefit plans subject to

limitations under section 436), distributions satisfy this paragraph (b)(2) if the employee's entire interest is distributed by the end of the calendar year that includes the fifth anniversary of the date of the employee's death. For example, if an employee dies on any day in 2022, then in order to satisfy the 5-year rule in section 401(a)(9)(B)(ii), the entire interest generally must be distributed by the end of 2027.

(3) *Annuity payments.* Distributions satisfy this paragraph (b)(3) if annuity payments that satisfy the requirements of § 1.401(a)(9)–6 commence no later than the end of the calendar year following the calendar year in which the employee died, except as provided in paragraph (d) of this section (permitting a surviving spouse to delay the commencement of distributions).

(4) *Determination of which rule applies*—(i) *No plan provision.* If a defined benefit plan does not provide for an optional provision described in paragraph (b)(4)(ii) or (b)(4)(iii) of this section specifying the method of distribution after the death of an employee, then distributions must be made as follows—

(A) If the employee has no designated beneficiary, as determined under § 1.401(a)(9)–4, distributions must satisfy paragraph (b)(2) of this section; and

(B) If the employee has a designated beneficiary, distributions must satisfy paragraph (b)(3) of this section.

(ii) *Optional plan provisions.* A defined benefit plan will not fail to satisfy section 401(a)(9) merely because it includes a provision specifying that the 5-year rule in paragraph (b)(2) of this section (rather than the annuity payment rule in paragraph (b)(3) of this section) will apply with respect to some or all of the employees who have a designated beneficiary. Further, a plan need not have the same method of distribution for the benefits of all employees in order to satisfy section 401(a)(9).

(iii) *Elections.* A defined benefit plan may include a provision, applicable to an employee who dies before the employee's required beginning date and who has a designated beneficiary, that permits the employee (or designated beneficiary) to elect whether the 5-year rule in paragraph (b)(2) of this section or the annuity payment rule in paragraph (b)(3) of this section applies. If a plan provides for this type of an election, then—

(A) The plan must specify the method of distribution that applies if neither the employee nor the designated beneficiary makes the election;

(B) The election must be made no later than the end of the earlier of the calendar year by which distributions must be made in order to satisfy paragraph (b)(2) of this section and the calendar year in which distributions would be required to begin in order to satisfy the requirements of paragraph (b)(3) of this section or, if applicable, paragraph (d) of this section; and

(C) As of the last date the election may be made, the election must be irrevocable with respect to the beneficiary (and all subsequent beneficiaries) and must apply to all subsequent calendar years.

(c) *Distributions in the case of a defined contribution plan*—(1) *In general.* The requirements of this paragraph are satisfied if distributions are made in accordance with paragraph (c)(2), (3), or (4) of this section, whichever applies with respect to the employee. The determination of whether paragraph (c)(2), (3), or (4) of this section applies is made in accordance with paragraph (c)(5) of this section.

(2) *5-year rule.* Distributions satisfy this paragraph (c)(2) if the employee's entire interest is distributed by the end of the calendar year that includes the fifth anniversary of the date of the employee's death. For example, if an employee dies on any day in 2022, the entire interest must be distributed by the end of 2027 in order to satisfy the 5-year rule in section 401(a)(9)(B)(ii). For purposes of this paragraph (c)(2), if an employee died before January 1, 2020, then the 2020 calendar year is disregarded when determining the calendar year that includes the fifth anniversary of the date of the employee's death.

(3) *10-year rule.* Distributions satisfy this paragraph (c)(3) if the employee's entire interest is distributed by the end of the calendar year that includes the tenth anniversary of the date of the employee's death. For example, if an employee dies on any day in 2021, the entire interest must be distributed by the end of 2031 in order to satisfy the 5-year rule in section 401(a)(9)(B)(ii), as extended to 10 years by section 401(a)(9)(H)(i).

(4) *Life expectancy payments.* Distributions satisfy this paragraph (c)(4) if distributions that satisfy the requirements of § 1.401(a)(9)–5 commence on or before the end of the calendar year following the calendar year in which the employee died, except as provided in paragraph (d) of this section (permitting a surviving spouse to delay the commencement of distributions).

(5) *Determination of which rule applies*—(i) *No plan provision.* If a defined contribution plan does not include an optional provision described in paragraph (c)(5)(ii) or (c)(5)(iii) of this section specifying the method of distribution after the death of an employee, distributions must be made as follows—

(A) If the employee does not have a designated beneficiary, as determined under § 1.401(a)(9)–4, distributions must satisfy the 5-year rule described in paragraph (c)(2) of this section;

(B) If the employee dies on or after the effective date of section 401(a)(9)(H) (as determined in § 1.401(a)(9)–1(b)(2)(i) or (ii), whichever applies to the plan) and has a designated beneficiary who is not an eligible designated beneficiary, as determined under § 1.401(a)(9)–4(e), distributions must satisfy the 10-year rule described in paragraph (c)(3) of this section; and

(C) If the employee has an eligible designated beneficiary, distributions must satisfy the life expectancy rule described in paragraph (c)(4) of this section.

(ii) *Optional plan provisions.* A defined contribution plan will not fail to satisfy section 401(a)(9) merely because it includes a provision specifying that the 10-year rule described in paragraph (c)(3) of this section (rather than the life expectancy rule described in paragraph (c)(4) of this section) will apply with respect to some or all of the employees who have an eligible designated beneficiary. Further, a plan need not have the same method of distribution for the benefits of all employees in order to satisfy section 401(a)(9).

(iii) *Elections.* A defined contribution plan may include a provision, applicable to an employee who dies before the employee's required beginning date and who has an eligible designated beneficiary, that permits the employee (or eligible designated beneficiary) to elect whether the 10-year rule in paragraph (c)(3) of this section or the life expectancy rule in paragraph (c)(4) of this section applies. If a plan provides for this type of election, then—

(A) The plan must specify the method of distribution that applies if neither the employee nor the designated beneficiary makes the election;

(B) The election must be made no later than end of the earlier of the calendar year by which distributions must be made in order to satisfy paragraph (c)(3) of this section and the calendar year in which distributions would be required to begin in order to satisfy the requirements of paragraph (c)(4) of this section or, if applicable, paragraph (d) of this section; and

(C) As of the last date the election may be made, the election must be irrevocable with respect to the beneficiary (and all subsequent beneficiaries) and must apply to all subsequent calendar years.

(d) *Permitted delay for surviving spouse beneficiaries.* If the employee's surviving spouse is the employee's sole beneficiary, then the commencement of distributions under paragraph (b)(3) or (c)(4) of this section may be delayed until the end of the calendar year in which the employee would have attained age 72 (or the calendar year in which the employee would have attained age 70½ in the case of an employee born before July 1, 1949).

(e) *Distributions that commence after surviving spouse's death*—(1) *In general.* If the employee's surviving spouse is the employee's sole beneficiary and dies after the employee, but before distributions have commenced under paragraph (d) of this section, then the 5-year rule in paragraph (b)(2) or (c)(2) of this section, the 10-year rule in paragraph (c)(3) of this section, and the annuity payment rules in paragraph (b)(3) of this section or the life expectancy rules in paragraph (c)(4) of this section are to be applied as if the surviving spouse were the employee. For this purpose, the date of death of the surviving spouse is substituted for the date of death of the employee.

(2) *Remarriage of surviving spouse.* If the delayed commencement in paragraph (d) of this section applies to the surviving spouse of the employee and the surviving spouse remarries but dies before distributions have begun, then the rules in paragraph (d) of this section are not available to the surviving spouse of the deceased employee's surviving spouse.

(3) *When distributions are treated as having begun to surviving spouse.* For purposes of section 401(a)(9)(B)(iv)(II), distributions are considered to have begun to the surviving spouse of an employee on the date, determined in accordance with paragraph (d) of this section, on which distributions are required to commence to the surviving spouse without regard to whether payments have actually been made before that date. However, see § 1.401(a)(9)–6(l) for an exception to this rule in the case of an annuity that commences early.

§ 1.401(a)(9)–4 Determination of the designated beneficiary.

(a) *Beneficiary designated under the plan*—(1) *In general.* This section provides rules for purposes of determining the designated beneficiary under section 401(a)(9). For this purpose, a designated beneficiary is an individual who is a beneficiary designated under the plan.

(2) *Entitlement to employee's interest in the plan.* A beneficiary designated under the plan is a person who is entitled to a portion of an employee's benefit, contingent on the employee's death or another specified event. The determination of whether a beneficiary designated under the plan is taken into account for purposes of section 401(a)(9) is made in accordance with paragraph (c) of this section or, if applicable, paragraph (d) of this section.

(3) *Specificity of beneficiary designation.* A beneficiary need not be specified by name in the plan or by the employee to the plan in order for the beneficiary to be designated under the plan, provided that the person who is to be the beneficiary is identifiable pursuant to the designation. For example, a designation of the employee's children as beneficiaries of equal shares of the employee's interest in the plan is treated as a designation of beneficiaries under the plan even if the children are not specified by name. The fact that an employee's interest under the plan passes to a certain person under a will or otherwise under applicable state law does not make that person a beneficiary designated under the plan absent a designation under the plan.

(4) *Affirmative and default elections of designated beneficiary.* A beneficiary designated under the plan may be designated by a default election under the terms of the plan or, if the plan so provides, by an affirmative election of the employee (or the employee's surviving spouse). The choice of beneficiary is subject to the requirements of sections 401(a)(11), 414(p), and 417. See §§ 1.401(a)(9)–8(d) and (e) for rules that apply to qualified domestic relations orders.

(b) *Designated beneficiary must be an individual.* A person that is not an individual, such as the employee's estate, is not a designated beneficiary. If a person other than an individual is a beneficiary designated under the plan, the employee will be treated as having no designated beneficiary, even if individuals are also designated as beneficiaries. However, see paragraph (f)(1) and (3) of this section for a rule under which certain beneficiaries of a see-through trust that is designated as the employee's beneficiary under the plan are treated as the employee's beneficiaries under the plan rather than the trust. In addition, the rules of this paragraph (b) do not apply to the extent separate account treatment applies in accordance with § 1.401(a)(9)–8(a).

(c) *Rules for determining beneficiaries*—(1) *Time period for determining the beneficiary.* Except as provided in paragraphs (d) and (f) of this section and § 1.401(a)(9)–6(b)(2)(i), a person is a beneficiary taken into account for purposes of section 401(a)(9) if that person is a beneficiary designated under the plan as of the date of the employee's death and none of the events described in paragraph (c)(2) of this section has occurred with respect to that person by September 30 of the calendar year following the calendar year of the employee's death.

(2) *Circumstances under which a beneficiary is disregarded as a beneficiary of the employee.* With respect to a beneficiary who was designated as a beneficiary under the plan as of the date of the employee's death (including an individual who is treated as having been designated as a beneficiary pursuant to paragraph (f) of this section), if any of the following events occurs by September 30 of the calendar year following the calendar year of the employee's death, then that beneficiary is not treated as a beneficiary—

(i) The beneficiary predeceases the employee;

(ii) The beneficiary is treated as having predeceased the employee pursuant to a simultaneous death provision under applicable State law or pursuant to a qualified disclaimer satisfying section 2518 that applies to the entire interest to which the beneficiary is entitled; or

(iii) The beneficiary receives the entire benefit to which the beneficiary is entitled.

(3) *Examples.* The following examples illustrate the rules of this paragraph (c).

(i) *Example 1.* Employer M maintains a defined contribution plan, Plan X. Employee A dies in 2022 having designated A's three children—B, C, and D—as beneficiaries, each with a one-third share of A's interest in Plan X. B executes a disclaimer within 9 months of A's death and the disclaimer satisfies the other requirements of a qualified disclaimer under section 2518. Pursuant to the qualified disclaimer, B is disregarded as a beneficiary.

(ii) *Example 2.* The facts are the same as in *Example 1* in paragraph (c)(3)(i) of this section except that B does not execute a disclaimer until 10 months after A's death. Even if the disclaimer is executed by September 30 of the calendar year following the calendar year of A's death, the disclaimer is not a qualified disclaimer (because B does not meet the 9-month requirement of section 2518) and B remains a designated beneficiary of A.

(iii) *Example 3.* The facts are the same as in *Example 1* in paragraph (c)(3)(i) of this section except that, in exchange for B's disclaimer of the one-third share of A's interest in Plan X, C transfers C's interest in real property to B. Because B has received consideration for B's disclaimer of the one-third share, it is not a qualified disclaimer under section 2518 and B remains a designated beneficiary.

(iv) *Example 4.* The facts are the same as in *Example 1* in paragraph (c)(3)(i) of this section except that Charity E (an organization exempt from taxation under section 501(c)(3)) also is a beneficiary designated under the plan as of the date of A's death, with B, C, D, and Charity E each having a one-fourth share of A's interest in Plan X. Plan X distributes Charity E's one-fourth share of A's interest in the plan by September 30 of the calendar year following the calendar year of A's death. Accordingly, Charity E is disregarded as A's beneficiary, and B, C, and D are treated as A's designated beneficiaries.

(v) *Example 5.* The facts are the same as in *Example 1* in paragraph (c)(3)(i) of this section except that A's spouse, F, also is a beneficiary designated under the plan. A and F were residents of State Z so that State Z law applies. The laws of State Z include a simultaneous death provision under which two individuals who die within a 120-hour period of one another are treated as predeceasing each other. F dies four hours after A and under the laws of State Z, F is treated as predeceasing A. Because, under applicable State law, F is treated as predeceasing A, F is disregarded as a beneficiary of A.

(vi) *Example 6.* The facts are the same as in *Example 1* in paragraph (c)(3)(i) of this section except that B, who was alive as of the date of A's death, dies before September 30 of the calendar year following the calendar year of A's death. Prior to B's death, none of the events described in paragraph (c)(2) of this section occurred with respect to B. Accordingly, B is still a beneficiary taken into account for purposes of section 401(a)(9) regardless of the identity of B's successor beneficiaries.

(d) *Application of beneficiary designation rules to surviving spouse.* This paragraph (d) applies in the case of distributions to which § 1.401(a)(9)–3(e) applies (because the employee's spouse is the employee's sole beneficiary as of September 30 of the calendar year following the calendar year of the employee's death, and the surviving spouse dies before distributions to the spouse have begun). If this paragraph (d) applies, then the determination of whether a person is a beneficiary of the surviving spouse is made using the rules of paragraph (c) of this section, except that the date of the surviving spouse's death is substituted for the date of the employee's death. Thus, a person is a beneficiary if that person is a beneficiary designated under the plan as of the date of the surviving spouse's death and remains a beneficiary as of September 30 of the calendar year following the calendar year of the surviving spouse's death.

(e) *Eligible designated beneficiaries*—(1) *In general.* A designated beneficiary of the employee is an eligible designated beneficiary if, at the time of the employee's death, the designated beneficiary is—

(i) The surviving spouse of the employee;

(ii) A child of the employee who has not reached the age of majority within the meaning of paragraph (e)(3) of this section;

(iii) Disabled within the meaning of paragraph (e)(4) of this section;

(iv) Chronically ill within the meaning of paragraph (e)(5) of this section;

(v) Not more than 10 years younger than the employee as determined under paragraph (e)(6) of this section; or

(vi) A designated beneficiary of an employee if the employee died before the effective date of section 401(a)(9)(H) described in § 1.401(a)(9)–1(b)(2)(i) and (ii), whichever applies to the plan.

(2) *Multiple designated beneficiaries*—(i) *In general.* Except as provided in paragraphs (e)(2)(ii) of this section (providing a special rule for children), (g)(3)(ii) of this section (relating to applicable multi-beneficiary trusts), and § 1.401(a)(9)–8(a) (relating to separate account treatment), if the employee has more than one designated beneficiary, and at least one of those beneficiaries is not an eligible designated beneficiary as determined in accordance with paragraph (e)(1) of this section, then the employee is treated as not having an eligible designated beneficiary.

(ii) *Special rule for children.* If any of the employee's designated beneficiaries is an eligible designated beneficiary because the beneficiary is the child of the employee who had not reached the age of majority at the time of the employee's death, then the employee is treated as having an eligible designated beneficiary even if the employee has other designated beneficiaries who are not eligible designated beneficiaries.

(3) *Determination of age of majority.* An individual reaches the age of majority on the individual's 21st birthday.

(4) *Disabled individual*—(i) *In general.* Subject to the documentation requirements of paragraph (e)(7) of this section, an individual is disabled if, as of the date of the employee's death, the individual is described in paragraph (e)(4)(ii) or (iii) of this section, or paragraph (e)(4)(iv) of this section applies.

(ii) *Disability defined for individual who is age 18 or older.* An individual who, as of the date of the employee's death, is age 18 or older is disabled if, as of that date, the individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration.

(iii) *Disability defined for individual who is not age 18 or older.* An individual who, as of the date of the employee's death, is not age 18 or older is disabled if, as of that date, that individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration.

(iv) *Use of social security disability determination.* If the Commissioner of Social Security has determined that, as of the date of the employee's death, an individual is disabled within the meaning of 42 U.S.C. 1382c(a)(3), then that individual will be deemed to be disabled within the meaning of this paragraph (e)(4).

(5) *Chronically ill individual.* An individual is chronically ill if the individual is chronically ill within the definition of section 7702B(c)(2) and satisfies the documentation requirements of paragraph (e)(7) of this paragraph. However, for purposes of the preceding sentence, an individual will be treated as chronically ill under section 7702B(c)(2)(A)(i) only if there is a certification from a licensed health care practitioner (as that term is defined in section 7702B(c)(4)) that, as of the date of the certification, the individual is unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for an indefinite period which is reasonably expected to be lengthy in nature (and not merely for 90 days).

(6) *Individual not more than 10 years younger than the employee.* Whether a designated beneficiary is not more than 10 years younger than the employee is determined based on the dates of birth of the employee and the beneficiary. Thus, for example, if an employee's date of birth is October 1, 1953, then the employee's beneficiary is not more than

10 years younger than the employee if the beneficiary was born on or before October 1, 1963.

(7) *Documentation requirements for disabled or chronically ill individuals.* This paragraph (e)(7) is satisfied with respect to an individual described in paragraph (e)(1)(iii) or (iv) of this section if documentation of the disability or chronic illness described in paragraph (e)(4) or (5) of this section, respectively, is provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the employee's death. For individuals described in paragraph (e)(1)(iv) of this section, the documentation must include a certification from a licensed health care practitioner (as that term is defined in section 7702B(c)(4)).

(8) *Applicability of definition of eligible designated beneficiary to beneficiary of surviving spouse.* In a case to which § 1.401(a)(9)–3(d) applies (generally involving distributions after a surviving spouse's death), a designated beneficiary of the employee's surviving spouse is an eligible designated beneficiary provided that designated beneficiary would be an eligible designated beneficiary described in paragraph (e)(1) of this section if that paragraph were to be applied by substituting the surviving spouse for the employee.

(9) *Examples.* The following examples illustrate the rules of this paragraph (e).

(i) *Example 1.* Employer M maintains a defined contribution plan, Plan X. Employee A designates A's child, B, as the sole beneficiary of A's interest in Plan X. B will not reach the age of majority until 2024. A dies in 2022, after A's required beginning date. As of the date of A's death, B is disabled within the meaning of paragraph (e)(4) of this section, and the documentation requirements of paragraph (e)(7) of this section are timely satisfied with respect to B. Due to B's disability, B remains an eligible designated beneficiary even after reaching the age of majority in 2024, and Plan X is not required to distribute A's remaining interest in the plan by the end of 2034 pursuant to the rules of § 1.401(a)(9)–5(e)(4), but instead may continue life expectancy payments to B during B's lifetime.

(ii) *Example 2.* The facts are the same as in *Example 1* in paragraph (e)(9)(i) of this section except that the documentation requirements of paragraph (e)(7) of this section are not timely satisfied with respect to B. B ceases to be an eligible designated beneficiary upon reaching the age of majority in 2024, and Plan X is required to distribute A's remaining interest in the plan by the end of 2034 pursuant to the rules of § 1.401(a)(9)–5(e)(4).

(iii) *Example 3.* The facts are the same as in *Example 1* in paragraph (e)(9)(i) of this section except that B becomes disabled in 2023 (after A's death in 2022). Because B was not disabled as of the date of A's death, B ceases to be an eligible designated beneficiary upon reaching the age of majority in 2024, and Plan X is required to distribute A's remaining interest in the plan by the end of 2034 pursuant to the rules of § 1.401(a)(9)–5(e)(4).

(f) *Special rules for trusts*—(1) *Look-through of trust to determine designated beneficiaries*—(i) *In general.* If the requirements of paragraph (f)(2) of this section are met with respect to a trust that is designated as the beneficiary of an employee under a plan, then certain beneficiaries of the trust that are described in paragraph (f)(3) of this section (and not the trust itself) are treated as having been designated as beneficiaries of the employee under the plan, provided that those beneficiaries are not disregarded under paragraph (c)(2) of this section. A trust described in the preceding sentence is referred to as a see-through trust.

(ii) *Types of trusts.* The determination of which beneficiaries of a see-through trust are treated as having been designated as beneficiaries of the employee under the plan depends on whether the see-through trust is a conduit trust or an accumulation trust. For this purpose—

(A) The term *conduit trust* means a see-through trust, the terms of which provide that, with respect to the deceased employee's interest in the plan, all distributions will, upon receipt by the trustee, be paid directly to, or for the benefit of, specified beneficiaries; and

(B) The term *accumulation trust* means any see-through trust that is not a conduit trust.

(2) *Trust requirements.* The requirements of this paragraph (f)(2) are met if, during any period for which required minimum distributions are being determined by treating the beneficiaries of the trust as having been designated as beneficiaries of the employee under the plan, the following requirements are met—

(i) The trust is a valid trust under state law or would be but for the fact that there is no corpus.

(ii) The trust is irrevocable or will, by its terms, become irrevocable upon the death of the employee.

(iii) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's interest in the plan are identifiable (within the meaning of paragraph (f)(5) of this section) from the trust instrument.

(iv) The documentation requirements in paragraph (h) of this section have been satisfied.

(3) *Trust beneficiaries treated as beneficiaries of the employee*—(i) *In general.* Subject to the rules of paragraphs (f)(3)(ii) and (iii) of this section, the following beneficiaries of a see-through trust are treated as having been designated as beneficiaries of the employee under the plan—

(A) Any beneficiary who could receive amounts in the trust representing the employee's interest in the plan that are neither contingent upon, nor delayed until, the death of another trust beneficiary who did not predecease (and is not treated as having predeceased) the employee; and

(B) Any beneficiary of an accumulation trust that could receive amounts in the trust representing the employee's interest in the plan that were not distributed to beneficiaries described in paragraph (f)(3)(i)(A) of this section.

(ii) *Certain trust beneficiaries disregarded*—(A) *Entitlement conditioned on death of secondary beneficiary.* Any beneficiary of an accumulation trust who could receive amounts from the trust that represent the employee's interest in the plan solely because of the death of another beneficiary described in paragraph (f)(3)(i)(B) of this section is not treated as having been designated as a beneficiary of the employee under the plan. The preceding sentence does not apply if the other beneficiary described in paragraph (f)(3)(i)(B) of this section—

(*1*) Predeceased (or is treated as having predeceased) the employee; or

(*2*) Also is described in paragraph (f)(3)(i)(A) of this section.

(B) *Entitlement conditioned on death of young individual.* If any beneficiary of a see-through trust is an individual who is treated as a beneficiary of the employee under paragraph (f)(3)(i)(A) of this section, and the terms of the trust require full distribution of amounts in the trust representing the employee's interest in the plan to that individual by the later of the end of the calendar year following the calendar year of the employee's death and the end of the tenth calendar year following the calendar year in which that individual attains the age of majority (within the meaning of paragraph (e)(3) of this section), then any other beneficiary of the trust who could receive amounts in the trust representing the employee's interest in the plan if that individual dies before full distribution to that individual is made is not treated as having been designated as a beneficiary of the employee under the plan. The preceding sentence does not apply if the beneficiary who could receive amounts in the trust conditioned on the death of that individual also is described in paragraph (f)(3)(i)(A) of this section.

(iii) *Certain accumulations disregarded.* For purposes of this paragraph (f)(3), a trust will not fail to be treated as a conduit trust merely because the trust terms requiring the direct payment of amounts received from the plan do not apply after the death of all of the beneficiaries described in paragraph (f)(3)(i)(A) of this section.

(4) *Multiple trust arrangements.* If a beneficiary of a see-through trust is another trust, the beneficiaries of the second trust will be treated as beneficiaries of the first trust, provided that the requirements of paragraph (f)(2) of this section are satisfied with respect to the second trust. In that case, the beneficiaries of the second trust are treated as having been designated as beneficiaries of the employee under the plan.

(5) *Identifiability of trust beneficiaries*—(i) *In general.* Except as otherwise provided in this paragraph (f)(5), trust beneficiaries described in paragraph (f)(3) of this section are identifiable if it is possible to identify each person eligible to receive a portion of the employee's interest in the plan through the trust. For this purpose, the specificity requirements of paragraph (a)(3) of this section apply.

(ii) *Power of appointment*—(A) *Exercise or release of power of appointment by September 30.* A trust does not fail to satisfy the identifiability requirements of this paragraph (f)(5) merely because an individual (powerholder) has the power to appoint a portion of the employee's interest to one or more beneficiaries that are not identifiable within the meaning of paragraph (f)(5)(i) of this section. If the power of appointment is exercised in favor of one or more identifiable beneficiaries by September 30 of the calendar year following the calendar year of the employee's death, then those identifiable beneficiaries are treated as beneficiaries designated under the plan. The preceding sentence also applies if, by that September 30, in lieu of exercising the power of appointment, the powerholder restricts it so that the power can be exercised at a later time in favor of only two or more identifiable beneficiaries (in which case, those identified beneficiaries are treated as beneficiaries designated under the plan). However, if, by that September 30, the power of appointment is not exercised (or restricted) in favor of one or more beneficiaries that are identifiable within the meaning of paragraph (f)(5)(i) of this section, then each taker in default (that is, any person that is entitled to the portion that represents the employee's interest in the plan subject to the power of appointment in the absence of the powerholder exercising the power) is treated as a beneficiary designated under the plan.

(B) *Exercise of power of appointment after September 30 of the calendar year following the calendar year of the employee's death.* If an individual has a power of appointment to appoint a portion of the employee's interest to one or more beneficiaries and the individual exercises the power of appointment after September 30 of the calendar year following the calendar year of the employee's death, then the rules of paragraph (f)(5)(iv) of this section apply with respect to any trust beneficiary that is added pursuant to the exercise of the power of appointment.

(iii) *Modification of trust terms*—(A) *State law will not cause trust to fail to satisfy identifiability requirement.* A trust will not fail to satisfy the identifiability requirements of this paragraph (f)(5) merely because the trust is subject to state law that permits the trust terms to be modified after the death of the employee (such as through a court reformation or a permitted decanting) and thus, permits changing the beneficiaries of the trust.

(B) *Modification of trust to remove trust beneficiaries.* A trust beneficiary described in paragraph (f)(3) of this section may be removed pursuant to a modification of trust terms (such as through a court reformation or a permitted decanting) by September 30 of the calendar year following the calendar year of the employee's death, in which case that person is disregarded in determining the employee's designated beneficiary.

(C) *Modification of trust to add trust beneficiaries.* A trust beneficiary described in paragraph (f)(3) of this section may be added through a modification of trust terms (such as through a court reformation or a permitted decanting). If the beneficiary is added on or before September 30 of the calendar year following the calendar year of the employee's death, paragraph (c) of this section will apply taking into account the beneficiary that was added. If the beneficiary is added after that September 30, then the rules of paragraph (f)(5)(iv) of this section will apply with respect to the beneficiary that is added.

(iv) *Addition of beneficiary after September 30.* If, after September 30 of the calendar year following the calendar year of the employee's death, a trust beneficiary described in paragraph (f)(3) of this section is added as a trust beneficiary (whether through the exercise of a power of appointment, the modification of trust terms, or otherwise), then—

(A) The addition of the beneficiary will not cause the trust to fail to satisfy the identifiability requirements of this paragraph (f)(5);

(B) Beginning in the calendar year after the calendar year in which the new trust beneficiary was added, the rules of § 1.401(a)(9)–5(f)(1) will apply taking into account the new beneficiary and all of the beneficiaries of the trust that were treated as beneficiaries of the employee before the addition of the new beneficiary; and

(C) Subject to paragraph (f)(5)(v) of this section, the rules of paragraphs (b) and (e)(2) of this section and § 1.401(a)(9)–5(f)(2) will apply taking into account the new beneficiary and all of the beneficiaries of the trust that were treated as beneficiaries of the employee before the addition of the new beneficiary.

(v) *Delay in full distribution requirement.* This paragraph (f)(5)(v) provides a special rule that applies if a full distribution of the employee's entire interest in the plan is not required in a calendar year pursuant to § 1.401(a)(9)–5(e), but a beneficiary is added in that calendar year. In that case, if, taking into account the added beneficiary pursuant to paragraph (f)(5)(iv)(C) of this section, a full distribution of the employee's entire interest in the plan would have been required in that calendar year or an earlier calendar year, then a full distribution of the employee's entire interest in the plan will not be required until the end of the calendar year after the calendar year in which the beneficiary is added. For example, if life expectancy payments are being made to an eligible designated beneficiary and, more than 10 years after the employee's death, a beneficiary is added who is not an eligible designated beneficiary as described in paragraph (e) of this section, then the employee is treated as not having an eligible designated beneficiary for purposes of § 1.401(a)(9)–5(e)(2) (so that a full distribution of the employee's entire interest in the plan would have been required within 10 years of the employee's death). However, pursuant to this paragraph (f)(5)(v), the full distribution of the employee's entire interest in the plan is not required until the end of the calendar year following the calendar year in which the new trust beneficiary was added.

(6) *Examples.* The following examples illustrate the see-through trust rules of this paragraph (f).

(i) *Example 1*—(A) *Facts.* Employer L maintains a defined contribution plan, Plan W. Unmarried Employee C died in 2022 at age 30. Prior to C's death, C named a testamentary trust (Trust T) that satisfies the requirements of paragraph (f)(2) of this section, as the beneficiary of C's interest in Plan W. The terms of Trust T require that all distributions received from Plan W, upon receipt by the trustee, be paid directly to D, C's sibling, who is 5 years older than C. The terms of Trust T also provide that, if D dies before C's entire account balance has been distributed to D, E, will be the beneficiary of C's remaining account balance.

(B) *Analysis.* Pursuant to paragraph (f)(1)(ii)(A) of this section, Trust T is a conduit trust. Because Trust T is a conduit trust (meaning the residual beneficiary rule in paragraph (f)(3)(i)(B) of this section does not apply) and because E is only entitled to any portion of C's account if D dies before the entire account has been distributed, E is disregarded in determining C's designated beneficiary. Because D is an eligible designated beneficiary, D may use the life expectancy rule of § 1.401(a)(9)–3(c)(4). Accordingly, even if D dies before C's entire interest in Plan W is distributed to Trust T, D's life expectancy continues to be used to determine the applicable denominator. Note, however, that because § 1.401(a)(9)–5(e) applies in this situation, a distribution of C's entire interest in Plan W will be required no later than 10 years after the calendar year in which D dies.

(ii) *Example 2*—(A) *Facts related to plan and beneficiary.* Employer M maintains a defined contribution plan, Plan X. Employee A, an employee of M, died in 2022 at the age of 55, survived by Spouse B, who was 50 years old. A's account balance in Plan X is invested only in productive assets and was includible in A's gross estate under section 2039. A named a testamentary trust (Trust P) as the beneficiary of all amounts payable from A's account in Plan X after A's death. Trust P satisfies the see-through trust requirements of paragraph (f)(2) of this section.

(B) *Facts related to trust.* Under the terms of Trust P, all trust income is payable annually to B, and no one has the power to appoint Trust P principal to any person other than B. A's sibling, who is less than 10 years younger than A (and thus is an eligible designated beneficiary) and is younger than B, is the sole residual beneficiary of Trust P. Also, under the terms of Trust P, if A's sibling predeceases B, then, upon B's death, all Trust P principal is distributed to Charity Z (an organization exempt from tax under section 501(c)(3)). No other person has a beneficial interest in Trust P. Under the terms of Trust P, B has the power, exercisable annually, to compel the trustee to withdraw from A's account balance in Plan X an amount equal to the income earned during the calendar year on the assets held in A's account in Plan X and to distribute that amount through Trust P to B. Plan X includes no prohibition on withdrawal from A's account of amounts in excess of the annual required minimum distributions under section 401(a)(9). In accordance with the terms of Plan X, the trustee of Trust P elects to take annual life expectancy payments pursuant to section 401(a)(9)(B)(iii). If B exercises the withdrawal power, the trustee must withdraw from A's account under Plan X the greater of the amount of income earned in the account during the calendar year or the required minimum distribution. However, under the terms of Trust P, and applicable state law, only the portion of the Plan X distribution received by the trustee equal to the income earned by A's account in Plan X is required to be distributed to B (along with any other trust income).

(C) *Analysis.* Because some amounts distributed from A's account in Plan X to Trust P may be accumulated in Trust P during B's lifetime, Trust P is an accumulation trust. Pursuant to paragraph (f)(3)(i)(B) of this section, A's sibling, as the residual beneficiary of Trust P, is treated as a beneficiary designated under Plan X (even though access to those amounts is delayed until after B's death). Pursuant to paragraph (f)(2)(iii)(A) of this section, because Charity Z's entitlement to amounts in the trust is based on the death of a beneficiary described in paragraph (f)(3)(i)(B) of this section, Charity Z is disregarded as a beneficiary of A. Under § 1.401(a)(9)–5(f)(1), the designated beneficiary used to determine the applicable denominator is the oldest of the designated beneficiaries of Trust P's interest in Plan X. B is the oldest of the beneficiaries of Trust P's interest in Plan X (including residual beneficiaries). Thus, the applicable denominator for purposes of section 401(a)(9)(B)(iii) is B's life expectancy. Because A's sibling is a beneficiary of A's account in Plan X in addition to B, B is not the sole beneficiary of A's account and the special rule in section 401(a)(9)(B)(iv) and § 1.401(a)(9)–3(d) is not available. Accordingly, the annual required minimum distributions from the account to Trust P must begin no later than the end of the calendar year immediately following the calendar year of A's death.

(iii) *Example 3*—(A) *Facts.* The facts are the same as in *Example 2* in paragraph (f)(6)(ii) of this section except that A's sibling is more than 10 years younger than A, meaning that at least one of the beneficiaries of Trust P's interest in Plan X is not an eligible designated beneficiary.

(B) *Analysis.* Pursuant to paragraph (e)(2)(i) of this section, A is treated as not having an eligible designated beneficiary. Pursuant to § 1.401(a)(9)–3(c)(5), the trustee of Trust P is not permitted to make an election to take annual life expectancy distributions and the 10-year rule of § 1.401(a)(9)–3(c)(3) applies.

(iv) *Example 4*—(A) *Facts related to plan and beneficiary.* Employer N maintains a defined contribution plan, Plan Y. Employee F, an employee of N, died in 2022 at the age of 60. F named a testamentary trust (Trust Q), which was established under F's will, as the beneficiary of all amounts payable from F's account in Plan X after F's death. Trust Q satisfies the see-through trust requirements of paragraph (f)(2) of this section.

(B) *Facts related to trust.* Under the terms of Trust Q, all trust income is payable to F's surviving spouse, G, and G has a power of appointment to name the beneficiaries of the residual in Trust Q. The power of appointment provides that, if G does not exercise the power, then upon G's death, F's descendants are entitled to the remainder interest in Trust Q, per stirpes. As of the date of F's death, F has two children, K and L, who are not disabled or chronically ill and who are both older than age 21. Before September 30 of the calendar year following the calendar year in which F died, G irrevocably restricts G's power of appointment so that G may exercise the power to appoint the remainder beneficiaries of Trust Q only in favor of G's siblings (who all are less than 10 years younger than F and thus, are eligible designated beneficiaries).

(C) *Analysis.* Pursuant to paragraph (f)(5)(ii)(A) of this section, because G timely restricted the power of appointment so that G may exercise the power to appoint the residual interest in Trust Q only in favor of G's siblings, the designated beneficiaries are G and G's siblings. Because all of the designated beneficiaries are eligible designated beneficiaries, annual life expectancy payments are permitted under section

401(a)(9)(B)(iii). Note, however, that because § 1.401(a)(9)–5(e) applies, a distribution of the remaining interest is required by no later than 10 years after the calendar year in which the oldest of G and G's siblings dies.

(v) *Example 5*—(A) *Facts.* The facts are the same as in *Example 4* in paragraph (f)(6)(iv) of this section except that G does not restrict the power by September 30 of the calendar year following the calendar year of F's death.

(B) *Analysis.* Pursuant to paragraph (f)(5)(ii)(A) of this section, G, K, and L are treated as F's beneficiaries. Pursuant to § 1.401(a)(9)–3(c)(5), because K and L are not eligible designated beneficiaries, the trustee of Trust Q is not permitted to make an election to take annual life expectancy distributions, and the 10-year rule of § 1.401(a)(9)–3(c)(3) applies.

(g) *Applicable multi-beneficiary trusts*—(1) *General definition of an applicable multi-beneficiary trust.* An applicable multi-beneficiary trust is a see-through trust with more than one beneficiary and with respect to which—

(i) All of the trust beneficiaries are designated beneficiaries; and

(ii) At least one of the trust beneficiaries is an eligible designated beneficiary who is disabled (as defined in paragraph (e)(1)(iii) of this section) or chronically ill (as defined in paragraph (e)(1)(iv) of this section).

(2) *Type I applicable multi-beneficiary trust.* An applicable multi-beneficiary trust is a type I applicable multi-beneficiary trust if the terms of the trust provide that it is to be divided immediately upon the death of the employee into separate trusts for each beneficiary.

(3) *Type II applicable multi-beneficiary trust*—(i) *General definition.* An applicable multi-beneficiary trust is a type II applicable multi-beneficiary trust if—

(A) The trust terms identify one or more individuals, each of whom is disabled (as defined in paragraph (e)(1)(iii) of this section) or chronically ill (as defined in paragraph (e)(1)(iv) of this section), who are entitled to benefits during their lifetime; and

(B) The terms of the trust provide that no individual (other than an individual described in paragraph (g)(3)(i)(A) of this section) has any right to the employee's interest in the plan until the death of all of the eligible designated beneficiaries described in paragraph (g)(3)(i)(A) with respect to the trust.

(ii) *Special rule for type II applicable multi-beneficiary trusts.* If an employee's beneficiary is a type II applicable multi-beneficiary trust described in paragraph (g)(3)(i) of this section, then the beneficiaries of the trust described in paragraph (g)(3)(i)(A) of this section are treated as eligible designated beneficiaries without regard to whether any of the other trust beneficiaries are not eligible designated beneficiaries.

(h) *Documentation requirements for trusts*—(1) *General rule.* The documentation requirements of this paragraph (h) are satisfied if—

(i) In the case of required minimum distributions while the employee is still alive, paragraph (h)(2) of this section is satisfied; or

(ii) In the case of required minimum distributions after the employee has died, or after the employee's surviving spouse has died in a case to which § 1.401(a)(9)–3(d) applies, paragraph (h)(3) of this section is satisfied.

(2) *Required minimum distributions while employee is still alive*—(i) *In general.* If an employee designates a trust as the beneficiary of the employee's entire benefit and the employee's spouse is the only beneficiary of the trust treated as a beneficiary of the employee pursuant to the rules of paragraph (f) of this section, then, in order to satisfy the documentation requirements of this paragraph (h)(2) (so that the applicable denominator for a distribution calendar year may be determined under the rules of § 1.401(a)(9)–35(c)(2), assuming the other requirements of paragraph (f)(2) of this section are satisfied), before the first day of the distribution calendar year the employee must either satisfy the requirements of paragraph (h)(2)(ii) of this section (requiring the employee to provide a copy of the trust instrument) or the requirements of paragraph (h)(2)(iii) of this section (requiring the employee to provide a list of beneficiaries).

(ii) *Employee to provide copy of trust instrument.* An employee satisfies the requirements of this paragraph (h)(2)(ii) if the employee—

(A) Provides to the plan administrator a copy of the trust instrument; and

(B) Agrees that, if the trust instrument is amended at any time in the future, the employee will, within a reasonable time, provide to the plan administrator a copy of each amendment.

(iii) *Employee to provide list of beneficiaries.* An employee satisfies the requirements of this paragraph (h)(2)(iii) if the employee—

(A) Provides to the plan administrator a list of all of the beneficiaries of the trust (including contingent beneficiaries) with a description of the conditions on their entitlement sufficient to establish whether the spouse is the sole beneficiary;

(B) Certifies that, to the best of the employee's knowledge, the list described in paragraph (h)(2)(iii)(A) of this section is correct and complete and that the requirements of paragraph (f)(2)(i), (ii), and (iii) of this section are satisfied; and

(C) Agrees that, if the trust instrument is amended at any time in the future, the employee will, within a reasonable time, provide to the plan administrator corrected certifications to the extent that the amendment changes any information previously certified; and

(D) Agrees to provide a copy of the trust instrument to the plan administrator upon request.

(3) *Required minimum distributions after death*—(i) *In general.* In order to satisfy the documentation requirement of this paragraph (h)(3) for required minimum distributions after the death of the employee (or after the death of the employee's surviving spouse in a case to which § 1.401(a)(9)–3(d) applies), by October 31 of the calendar year immediately following the calendar year in which the employee died or, in a case to which § 1.401(a)(9)–3(d) applies, the employee's surviving spouse died, the trustee of the trust must satisfy the requirements of either paragraph (h)(3)(ii) (requiring the trustee to provide a list of beneficiaries) or paragraph (h)(3)(iii) of this section (requiring the trustee to provide a copy of the trust instrument).

(ii) *Trustee to provide list of beneficiaries.* A trustee satisfies the requirements of this paragraph (h)(3)(ii) if the trustee—

(A) Provides the plan administrator with a final list of all beneficiaries of the trust as of September 30 of the calendar year following the calendar year of the death (including contingent beneficiaries) with a description of the conditions on their entitlement sufficient to establish who are the beneficiaries;

(B) Certifies that, to the best of the trustee's knowledge, this list is correct and complete and that the requirements of paragraph (f)(2)(i), (ii), and (iii) of this section are satisfied; and

(C) Agrees to provide a copy of the trust instrument to the plan administrator upon request.

(iii) *Trustee to provide copy of trust instrument.* A trustee satisfies the requirements of this paragraph (h)(3)(iii) if the trustee provides the plan administrator with a copy of the actual trust document for the trust that is named as a beneficiary of the employee under the plan as of the employee's date of death.

(4) *Relief for discrepancy between trust instrument and employee*

certifications or earlier trust instruments—(i) *In general.* If required minimum distributions are determined based on the information provided to the plan administrator in certifications or trust instruments described in paragraph (h)(2) or (3) of this section, a plan will not fail to satisfy section 401(a)(9) merely because the actual terms of the trust instrument are inconsistent with the information in those certifications or trust instruments previously provided to the plan administrator, but only if—

(A) The plan administrator reasonably relied on the information provided; and

(B) The required minimum distributions for calendar years after the calendar year in which the discrepancy is discovered are determined based on the actual terms of the trust instrument.

(ii) *Excise tax.* For purposes of determining the amount of the excise tax under section 4974, the required minimum distribution is determined for any year based on the actual terms of the trust in effect during the year.

§ 1.401(a)(9)–5 Required minimum distributions from defined contribution plans.

(a) *General rules*—(1) *In general.* Subject to the rules of paragraph (e) of this section (requiring distribution of an employee's entire interest by a specified deadline in certain situations), if an employee's accrued benefit is in the form of an individual account under a defined contribution plan, the minimum amount required to be distributed for each distribution calendar year (as defined in paragraph (a)(2) of this section) is equal to the quotient obtained by dividing the account balance (determined under paragraph (b) of this section) by the applicable denominator (determined under paragraph (c) or (d) of this section, whichever is applicable). However, the required minimum distribution amount will never exceed the entire account balance on the date of the distribution. See paragraph (g) of this section for rules that apply if a portion of the employee's account is not vested.

(2) *Distribution calendar year*—(i) *In general.* A calendar year for which a minimum distribution is required is a distribution calendar year.

(ii) *First distribution calendar year for employee.* If an employee's required beginning date is April 1 of the calendar year following the calendar year in which the employee attains age 72, then the employee's first distribution calendar year is the year the employee attains age 72. If an employee's required beginning date is April 1 of the calendar year following the calendar year in which the employee retires, the employee's first distribution calendar year is the calendar year in which the employee retires.

(iii) *First distribution calendar year for beneficiary.* In the case of an employee who dies before the required beginning date, if the life expectancy rule in § 1.401(a)(9)–3(c)(4) applies, then the first distribution calendar year for the designated beneficiary is the calendar year after the calendar year in which the employee died (or, if applicable, the calendar year described in § 1.401(a)(9)–3(d)). See § 1.401(a)(9)–3(c)(5) to determine whether the life expectancy rule in § 1.401(a)(9)–3(c)(4) applies.

(3) *Time for distributions.* The distribution required for the employee's first distribution calendar year (as described in paragraph (a)(2)(ii) of this section) may be made on or before April 1 of the following calendar year. The required minimum distribution for any other distribution calendar year (including the required minimum distribution for the distribution calendar year in which the employee's required beginning date occurs or the first distribution calendar year for the designated beneficiary) must be made on or before the end of that distribution calendar year.

(4) *Minimum distribution incidental benefit requirement.* If distributions of an employee's account balance under a defined contribution plan are made in accordance with this section—

(i) With respect to the retirement benefits provided by that account balance, to the extent the incidental benefit requirement of § 1.401–1(b)(1)(i) requires distributions, that requirement is deemed satisfied; and

(ii) No additional distributions are required to satisfy section 401(a)(9)(G).

(5) *Annuity contracts*—(i) *Purchase of annuity contract permitted.* A plan may satisfy section 401(a)(9) by the purchase of an annuity contract from an insurance company in accordance with § 1.401(a)(9)–6(d) with the employee's entire individual account provided that the terms of the annuity satisfy § 1.401(a)(9)–6 and paragraph (e) of this section. However, a distribution of an annuity contract is not a distribution for purposes of this section.

(ii) *Transition from defined contribution rules to defined benefit rules.* If an annuity is purchased in accordance with paragraph (a)(5)(i) of this section after distributions are required to commence (the required beginning date, in the case of distributions commencing before death, or the calendar year determined under § 1.401(a)(9)–3(c)(4) or, if applicable, § 1.401(a)(9)–3(d), in the case of distributions commencing after death), then the plan will satisfy section 401(a)(9) only if, in the year of purchase, distributions from the individual account satisfy this section, and for calendar years following the year of purchase, payments under the annuity contract are made in accordance with § 1.401(a)(9)–6 and satisfy paragraph (e) of this section. Payments under the annuity contract during the year in which the annuity contract is purchased are treated as distributions from the individual account for purposes of determining whether the distributions from the individual account satisfy this section in the calendar year of purchase.

(iii) *Purchase of annuity contract with portion of employee's account.* A portion of an employee's account balance under a defined contribution plan is permitted to be used to purchase an annuity contract while another portion remains in the account, provided that the requirements of paragraphs (a)(5)(i) and (ii) of this section are satisfied (other than the requirement that the contract be purchased with the employee's entire individual account). In that case, in order to satisfy section 401(a)(9) for calendar years after the calendar year of purchase, the remaining account balance under the plan must be distributed in accordance with this section.

(6) *Impact of additional distributions in prior years.* If, for any distribution calendar year, the amount distributed exceeds the required minimum distribution for that calendar year, no credit towards a required minimum distribution will be given in subsequent calendar years for the excess distribution.

(b) *Determination of account balance*—(1) *General rule.* In the case of an individual account under a defined contribution plan, the benefit used in determining the required minimum distribution for a distribution calendar year is the account balance as of the last valuation date in the calendar year preceding that distribution calendar year (valuation calendar year) adjusted in accordance with this paragraph (b). For this purpose, except as provided in § 1.401(a)(9)–8(a), all of an employee's accounts under the plan are aggregated. Thus, all separate accounts, including a separate account for employee contributions under section 72(d)(2), are aggregated for purposes of this section.

(2) *Adjustment for subsequent allocations.* The account balance is increased by the amount of any contributions or forfeitures allocated to the account balance as of dates in the

valuation calendar year after the valuation date. For this purpose, contributions that are allocated to the account balance as of dates in the valuation calendar year after the valuation date, but that are not actually made during the valuation calendar year, may be excluded.

(3) *Adjustment for subsequent distributions.* The account balance is decreased by distributions made in the valuation calendar year after the valuation date.

(4) *Exclusion for QLAC contract.* The account balance does not include the value of any qualifying longevity annuity contract (QLAC), defined in § 1.401(a)(9)–6(q), that is held under the plan.

(5) *Treatment of rollovers.* If an amount is distributed from a plan and rolled over to another plan (receiving plan), § 1.401(a)(9)–7(b) provides additional rules for determining the benefit and required minimum distribution under the receiving plan. If an amount is transferred from one plan (transferor plan) to another plan (transferee plan) in a transfer to which section 414(l) applies, § 1.401(a)(9)–7(c) and (d) provide additional rules for determining the amount of the benefit and required minimum distribution under both the transferor and transferee plans.

(c) *Determination of applicable denominator during employee's lifetime*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section (relating to a spouse beneficiary who is more than 10 years younger than the employee), the applicable denominator for required minimum distributions for each distribution calendar year beginning with the first distribution calendar year (as described in paragraph (a)(2)(ii) of this section) is determined using the Uniform Lifetime Table in § 1.401(a)(9)–9(c)(2) for the employee's age as of the employee's birthday in the relevant distribution calendar year. The requirement to take an annual distribution calculated in accordance with the preceding sentence applies for distribution calendar years up to and including the calendar year that includes the employee's date of death. Thus, a required minimum distribution is due for the calendar year of the employee's death, and that amount must be distributed during that year to the beneficiary to the extent it has not already been distributed to the employee.

(2) *Spouse is sole beneficiary*—(i) *Determination of applicable denominator.* If the sole beneficiary of an employee is the employee's spouse who is more than 10 years younger than the employee, then the applicable denominator is the joint and last survivor life expectancy for the employee and spouse determined using the Joint and Last Survivor Life Expectancy Table in § 1.401(a)(9)–9(d) for the employee's and spouse's ages as of their birthdays in the relevant distribution calendar year (rather than the applicable denominator determined under paragraph (c)(1) of this section).

(ii) *Spouse must be sole beneficiary at all times.* Except as otherwise provided in paragraph (c)(2)(iii) of this section (relating to a death or divorce in a calendar year), the spouse is the sole beneficiary for purposes of determining the applicable denominator for a distribution calendar year during the employee's lifetime only if the spouse is the sole beneficiary of the employee's entire interest at all times during the distribution calendar year.

(iii) *Change in marital status.* If the employee and the employee's spouse are married on January 1 of a distribution calendar year, but do not remain married throughout that year (that is, the employee or the employee's spouse dies or they become divorced during that year), the employee will not fail to have a spouse as the employee's sole beneficiary for that year merely because they are not married throughout that year. However, the change in beneficiary due to the death or divorce of the spouse in a distribution calendar year will be effective for purposes of determining the applicable denominator under section 401(a)(9) and this paragraph (c) for the following calendar years.

(d) *Applicable denominator after employee's death*—(1) *Death on or after the employee's required beginning date*—(i) *In general.* If an employee dies after distribution has begun as determined under § 1.401(a)(9)–2(a)(3) (generally, on or after the employee's required beginning date), distributions must satisfy section 401(a)(9)(B)(i). In order to satisfy this requirement, the applicable denominator after the employee's death is determined under the rules of this paragraph (d)(1). The requirement to take an annual distribution in accordance with the preceding sentence applies for distribution calendar years up to and including the calendar year that includes the beneficiary's date of death. Thus, a required minimum distribution is due for the calendar year of the beneficiary's death, and that amount must be distributed during that calendar year to a beneficiary of the deceased beneficiary to the extent it has not already been distributed to the deceased beneficiary. The distributions also must satisfy section 401(a)(9)(B)(ii) (or, if applicable, section 401(a)(9)(B)(iii), taking into account sections 401(a)(9)(E)(iii), and 401(a)(9)(H)(ii) and (iii)). In order to satisfy those requirements, in addition to determining the applicable denominator under the rules of this paragraph (d)(1), the distributions also must satisfy any applicable requirements under paragraph (e) of this section.

(ii) *Employee with designated beneficiary.* If the employee has a designated beneficiary as of the date determined under § 1.401(a)(9)–4(c), the applicable denominator is the greater of—

(A) The designated beneficiary's remaining life expectancy; and

(B) The employee's remaining life expectancy.

(iii) *Employee with no designated beneficiary.* If the employee does not have a designated beneficiary as of the date determined under § 1.401(a)(9)–4(c), the applicable denominator is the employee's remaining life expectancy.

(2) *Death before an employee's required beginning date.* If an employee dies before distributions have begun (as determined under § 1.401(a)(9)–2(a)(3)) and the life expectancy rule described in § 1.401(a)(9)–3(c)(4) applies, then the applicable denominator for distribution calendar years beginning with the first distribution calendar year (as described in paragraph (a)(2)(iii) of this section) is the designated beneficiary's remaining life expectancy.

(3) *Remaining life expectancy*—(i) *Life expectancy table.* For purposes of this paragraph (d), all life expectancies are determined using the Single Life Table in § 1.401(a)(9)–9(c)(1).

(ii) *Employee's life expectancy.* The employee's remaining life expectancy is determined initially using the employee's age as of the employee's birthday in the calendar year of the employee's death. In subsequent calendar years, the remaining life expectancy is determined by reducing that initial life expectancy by one for each calendar year that has elapsed after that first calendar year.

(iii) *Nonspouse designated beneficiary.* If the designated beneficiary is not the employee's surviving spouse, then the designated beneficiary's remaining life expectancy is determined initially using the beneficiary's age as of the beneficiary's birthday in the calendar year following the calendar year of the employee's death. Except as otherwise provided in paragraph (d)(3)(iv) of this section, for subsequent calendar years, the designated beneficiary's remaining life expectancy is determined by reducing that initial life expectancy by one for each calendar year that has elapsed after that first calendar year.

(iv) *Spouse as designated beneficiary.* If the surviving spouse of the employee is the employee's sole beneficiary, then the surviving spouse's remaining life expectancy is redetermined each distribution calendar year using the surviving spouse's age as of the surviving spouse's birthday in that calendar year.

(e) *Distribution of employee's entire interest required*—(1) *In general.* Except as provided in paragraph (f) of this section, if an employee's accrued benefit is in the form of an individual account under a defined contribution plan, then the entire interest of the employee must be distributed by the end of the earliest of the calendar years described in paragraph (e)(2), (3), (4), or (5) of this section. However, the preceding sentence does not apply if section 401(a)(9)(H) does not apply with respect to the employee (for example, if both the employee and the employee's designated beneficiary died before January 1, 2020). See § 1.401(a)(9)–1(b) for rules relating to the section 401(a)(9)(H) effective date.

(2) *10-year limit for designated beneficiary who is not an eligible designated beneficiary.* If the employee's designated beneficiary is not an eligible designated beneficiary (as determined in accordance with § 1.401(a)(9)–4(e)), then the calendar year described in this paragraph (e)(2) is the tenth calendar year following the calendar year of the employee's death.

(3) *10-year limit following death of eligible designated beneficiary.* If the employee's designated beneficiary is an eligible designated beneficiary (as determined in accordance with § 1.401(a)(9)–4(e)), then the calendar year described in this paragraph (e)(3) is the tenth calendar year following the calendar year of the designated beneficiary's death.

(4) *10-year limit after minor child of the employee reaches age of majority.* If the employee's designated beneficiary is an eligible designated beneficiary only because the beneficiary is the child of the employee who has not reached the age of majority at the time of the employee's death, then the calendar year described in this paragraph (e)(4) is the tenth calendar year following the calendar year in which the designated beneficiary reaches the age of majority.

(5) *Life expectancy limit for older eligible designated beneficiaries.* If the employee's designated beneficiary is an eligible designated beneficiary (as determined in accordance with § 1.401(a)(9)–4(e)) and the applicable denominator is determined in accordance with paragraph (d)(1)(ii)(B) of this section (the employee's remaining life expectancy), then the calendar year described in this paragraph (e)(5) is the calendar year in which the applicable denominator would have been less than or equal to one if it were determined in accordance with paragraph (d)(1)(ii)(A) of this section (the designated beneficiary's remaining life expectancy).

(f) *Rules for multiple designated beneficiaries*—(1) *Determination of applicable denominator*—(i) *General rule.* Except as otherwise provided in paragraph (f)(1)(ii) of this section and § 1.401(a)(9)–8(a), if the employee has more than one designated beneficiary, then the determination of the applicable denominator under paragraph (d) of this section is made using the oldest designated beneficiary of the employee.

(ii) *Applicable multi-beneficiary trusts.* If an employee's beneficiary is a type II applicable multi-beneficiary trust described in § 1.401(a)(9)–4(g)(3)(i), then only the trust beneficiaries described in § 1.401(a)(9)–4(g)(3)(i)(A) are taken into account in determining the oldest designated beneficiary for purposes of paragraph (f)(1)(i) of this section.

(2) *Determination of when entire interest is required to be distributed*—(i) *General rule.* Except as otherwise provided in paragraphs (f)(2)(ii) and (iii) of this section and § 1.401(a)(9)–8(a), if an employee has more than one designated beneficiary, then paragraph (e)(1) of this section is applied with respect to the oldest of the employee's designated beneficiaries.

(ii) *Special rule for minor child.* If any of the employee's designated beneficiaries is an eligible designated beneficiary because that designated beneficiary is described in § 1.401(a)(9)–4(e)(1)(ii) (relating to the child of the employee who has not reached the age of majority at the time of the employee's death), then—

(A) Paragraphs (e)(3) and (4) of this section are applied using the oldest of the designated beneficiaries who are described in § 1.401(a)(9)–4(e)(1)(ii); and

(B) Paragraphs (e)(2) and (5) of this section do not apply.

(iii) *Applicable multi-beneficiary trusts.* If an employee's beneficiary is a type II applicable multi-beneficiary trust described in § 1.401(a)(9)–4(g)(3)(i), then—

(A) Paragraph (e)(3) of this section applies as if the death of the employee's eligible designated beneficiary does not occur until the death of the last trust beneficiary who is described in § 1.401(a)(9)–4(g)(3)(i)(A); and

(B) Paragraph (e)(5) of this section does not apply.

(g) *Treatment of nonvested amounts.* If the employee's benefit is in the form of an individual account under a defined contribution plan, the benefit used to determine the required minimum distribution for any distribution calendar year will be determined in accordance with paragraph (a) of this section without regard to whether or not all of the employee's benefit is vested. If, as of the end of a distribution calendar year (or as of the employee's required beginning date, in the case of the employee's first distribution calendar year), the total amount of the employee's vested benefit is less than the required minimum distribution for the calendar year, only the vested portion, if any, of the employee's benefit is required to be distributed by the end of the calendar year (or, if applicable, by the employee's required beginning date). However, the required minimum distribution for the subsequent calendar year must be increased by the sum of amounts not distributed in prior calendar years because the employee's vested benefit was less than the required minimum distribution determined in accordance with paragraph (a) of this section.

(h) *Distributions taken into account.* Except as provided in this paragraph (h), all amounts distributed from an individual account under a defined contribution plan are distributions that are taken into account in determining whether this section is satisfied, regardless of whether the amount is includible in income. Thus, for example, amounts that are excluded from income as recovery of investment in the contract under section 72 are taken into account for purposes of determining whether this section is satisfied for a calendar year. Similarly, amounts excluded from income as net unrealized appreciation on employer securities also are taken into account for purposes of satisfying this section. However, an amount is not taken into account in determining whether the required minimum distribution has been made for a distribution calendar year if that amount is described in § 1.402(c)–2(c)(3) (relating to amounts that are not treated as eligible rollover distributions).

§ 1.401(a)(9)–6 Required minimum distributions for defined benefit plans and annuity contracts.

(a) *Defined benefit plans*—(1) *In general.* In order to satisfy section 401(a)(9), except as otherwise provided in this section, distributions of the employee's entire interest under a defined benefit plan must be paid in the form of periodic annuity payments for the employee's life (or the joint lives of the employee and beneficiary) or over a period certain that does not exceed the maximum length of the period certain determined in accordance with paragraph (c) of this section. The interval between payments for the annuity must not exceed one year and, except as provided in paragraph (o)(4)(ii) of this section, must be uniform over the entire distribution period. Once payments have commenced over a period, the period may only be changed in accordance with paragraph (n) of this section. Life (or joint and survivor) annuity payments must satisfy the minimum distribution incidental benefit requirements of paragraph (b) of this section. Except as otherwise provided in this section (for example, permitted increases described in paragraph (o) of this section), all payments (whether paid over an employee's life, joint lives, or a period certain) also must be nonincreasing.

(2) *Definition of life annuity.* An annuity described in this section may be a life annuity (or joint and survivor annuity) with a period certain, provided that the life annuity (or joint and survivor annuity, if applicable) and the period certain payments each meet the requirements of paragraph (a)(1) of this section. For purposes of this section, if distributions are permitted to be made over the lives of the employee and the designated beneficiary, references to a life annuity include a joint and survivor annuity.

(3) *Annuity commencement*—(i) *First payment and frequency.* Annuity payments must commence on or before the employee's required beginning date (within the meaning of § 1.401(a)(9)–2(b)). The first payment, which must be made on or before the employee's required beginning date, must be the payment that is required for one payment interval. The second payment need not be made until the end of the next payment interval even if that payment interval ends in the next calendar year. Similarly, if the employee dies before the required beginning date, and distributions are to be made in accordance with section 401(a)(9)(B)(iii) (or, if applicable, section 401(a)(9)(B)(iv)), then the first payment, which must be made on or before the date determined under § 1.401(a)(9)–3(b)(3) or (d) (whichever is applicable), must be the payment that is required for one payment interval. Payment intervals are the periods for which payments are received, for example, bimonthly, monthly, semi-annually, or annually. All benefit accruals as of the last day of the first distribution calendar year must be included in the calculation of the amount of annuity payments for payment intervals ending on or after the employee's required beginning date.

(ii) *Example.* A defined benefit plan (Plan X) provides monthly annuity payments of $500 for the life of unmarried participants with a 10-year period certain. An unmarried, retired participant (A) in Plan X attains age 72 in 2025. In order to meet the requirements of this paragraph (a)(3), the first monthly payment of $500 must be made on behalf of A on or before April 1, 2026, and the payments must continue to be made in monthly payments of $500 thereafter for the life of A (or over the 10-year period certain, if longer).

(4) *Single-sum distributions*—(i) *In general.* In the case of a single-sum distribution of an employee's entire accrued benefit during a distribution calendar year, the portion of the distribution that is the required minimum distribution for the distribution calendar year (and thus not an eligible rollover distribution pursuant to section 402(c)(4)(B)) is determined using the rule in either paragraph (a)(4)(ii) or (iii) of this section.

(ii) *Treatment as individual account.* The portion of the single-sum distribution that is a required minimum distribution is determined by treating the single-sum-distribution as a distribution from an individual account plan and treating the amount of the single-sum distribution as the employee's account balance as of the end of the relevant valuation calendar year. If the single-sum distribution is being made in the calendar year that includes the required beginning date and the required minimum distribution for the employee's first distribution calendar year has not been distributed, the portion of the single-sum distribution that represents the required minimum distribution for the employee's first and second distribution calendar years is not eligible for rollover.

(iii) *Treatment as first annuity payment.* The portion of the single-sum distribution that is a required minimum distribution is permitted to be determined by expressing the employee's benefit as an annuity that would satisfy this section with an annuity starting date that is the first day of the distribution calendar year for which the required minimum distribution is being determined, and treating one year of annuity payments as the required minimum distribution for that year (and therefore, not an eligible rollover distribution). If the single-sum distribution is being made in the calendar year that includes the required beginning date, and the required minimum distribution for the employee's first distribution calendar year has not been made, then the benefit must be expressed as an annuity with an annuity starting date that is the first day of the first distribution calendar year, and the payments for the first two distribution calendar years are treated as required minimum distributions (and therefore not eligible rollover distributions).

(5) *Death benefits.* The rule in paragraph (a)(1) of this section prohibiting increasing payments under an annuity applies to payments made upon the death of an employee. However, the payment of an ancillary death benefit described in this paragraph (a)(5) may be disregarded in determining whether annuity payments are increasing, and it can be excluded in determining an employee's entire interest. A death benefit with respect to an employee's benefit is an ancillary death benefit for purposes of this paragraph (a) if—

(i) It is not paid as part of the employee's accrued benefit or under any optional form of the employee's benefit; and

(ii) The death benefit, together with any other potential payments with respect to the employee's benefit that may be provided to a survivor, satisfies the incidental benefit requirement of § 1.401–1(b)(1)(i).

(6) *Separate treatment of separate identifiable components.* If an employee's benefit under a defined benefit plan consists of separate identifiable components that are subject to different distribution elections, then the rules of this section may be applied separately to each of those components.

(7) *Additional guidance.* Additional guidance regarding how distributions under a defined benefit plan must be paid in order to satisfy section 401(a)(9) may be issued by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. See § 601.601(d) of this chapter.

(b) *Application of incidental benefit requirement*—(1) *Life annuity for employee.* If the employee's benefit is paid in the form of a life annuity for the life of the employee satisfying section 401(a)(9) without regard to the minimum distribution incidental benefit requirement under section 401(a)(9)(G) (MDIB requirement), then the MDIB requirement will be satisfied.

(2) *Joint and survivor annuity*—(i) *Determination of designated*

beneficiary. If the employee's benefit is paid in the form of a life annuity for the lives of the employee and a designated beneficiary, then the designated beneficiary is determined as of the annuity starting date.

(ii) *Spouse beneficiary.* If the employee's sole beneficiary is the employee's spouse and the distributions satisfy section 401(a)(9) without regard to the MDIB requirement, the distributions to the employee will be deemed to satisfy the MDIB requirement. For example, if an employee's benefit is being distributed in the form of a joint and survivor annuity for the lives of the employee and the employee's spouse and the spouse is the sole beneficiary of the employee, the amount of the periodic payment payable to the spouse would not violate the MDIB requirement if it were 100 percent of the annuity payment payable to the employee, regardless of the difference in the ages between the employee and the employee's spouse.

(iii) *Joint and survivor annuity, nonspouse beneficiary*—(A) *Explanation of rule.* If distributions commence in the form of a joint and survivor annuity for the lives of the employee and a beneficiary other than the employee's spouse, and the employee is age 72 or older on the employee's birthday in the calendar year that includes the annuity starting date, then the MDIB requirement will not be satisfied as of the date distributions commence unless, under the distribution option, the annuity payments satisfy the conditions of this paragraph (b)(2)(iii)(A). The periodic annuity payments to the survivor satisfy this paragraph (b)(2)(iii)(A) only if, at any time on or after the employee's required beginning date, those payments do not exceed the applicable percentage of the periodic annuity payment payable to the employee using the table in paragraph (b)(2)(iii)(B) of this section. The applicable percentage is based on the employee/beneficiary age difference, which is equal to the excess of the age of the employee over the age of the beneficiary based on their ages on their birthdays in the calendar year that includes the annuity starting date. In the case of an annuity that provides for increasing payments, the requirement of this paragraph (b)(2)(iii)(A) will not be violated merely because benefit payments to the beneficiary increase, provided the increase is determined in the same manner for the employee and the beneficiary. See paragraph (k) of this section for the rule for annuity payments with an annuity starting date that is before the calendar year in which an employee attains age 72.

(B) *Table applicable to paragraph (b)(2)(iii)(B) of this section.*

TABLE 1—APPLICABLE TO PARAGRAPH (b)(2)(iii)(B) OF THIS SECTION

Employee/beneficiary age difference	Applicable percentage
10 years or less	100
11	96
12	93
13	90
14	87
15	84
16	82
17	79
18	77
19	75
20	73
21	72
22	70
23	68
24	67
25	66
26	64
27	63
28	62
29	61
30	60
31	59
32	59
33	58
34	57
35	56
36	56
37	55
38	55
39	54
40	54
41	53
42	53
43	53
44 and greater	52

(3) *Period certain and annuity features.* If a distribution form includes a period certain, the amount of the annuity payments payable to the beneficiary need not be reduced during the period certain, but in the case of a joint and survivor annuity with a period certain, the amount of the annuity payments payable to the beneficiary must satisfy paragraph (b)(2)(iii)(A) of this section after the expiration of the period certain.

(4) *Deemed satisfaction of incidental benefit rule.* Except in the case of distributions with respect to an employee's benefit that include an ancillary death benefit described in paragraph (a)(5) of this section, to the extent the incidental benefit requirement of § 1.401–1(b)(1)(i) requires a distribution, that requirement is deemed to be satisfied if distributions satisfy the MDIB requirement of this paragraph (b). If the employee's benefits include an ancillary death benefit described in paragraph (a)(5) of this section, the benefits (including the ancillary death benefit) must be distributed in accordance with the incidental benefit requirement described in § 1.401–1(b)(1)(i) and the benefits (excluding the ancillary death benefit) must also satisfy the MDIB requirement of this paragraph (b).

(c) *Period certain annuity*—(1) *Distributions commencing during the employee's life.* If the employee is age 72 or older on the employee's birthday in the calendar year that includes the annuity starting date, then the period certain is not permitted to exceed the applicable denominator for the calendar year that includes the annuity starting date that would apply pursuant to § 1.401(a)(9)–5(c) if the plan were a defined contribution plan. However, that applicable denominator is determined taking into account the rules of § 1.401(a)(9)–5(c)(2) (relating to a spouse who is more than 10 years younger than the employee) only if the period certain is not provided in conjunction with a life annuity under paragraph (a)(2) of this section. See paragraph (k) of this section for the rule for annuity payments with an annuity starting date that is before the calendar year in which the employee attains age 72.

(2) *Distributions commencing after the employee's death.* If the employee dies before the required beginning date and annuity distributions commence after the death of the employee under the life expectancy rule (under section 401(a)(9)(B)(iii) or (iv)), the period certain for any distributions commencing after death may not exceed the applicable denominator that would apply pursuant to § 1.401(a)(9)–5(d)(2) for the calendar year that includes the annuity starting date if the plan were a defined contribution plan.

(d) *Use of annuity contract.* A plan will not fail to satisfy section 401(a)(9) merely because distributions are made from an annuity contract purchased with the employee's benefit by the plan from an insurance company that is licensed to do business under the laws of the State in which the contract is sold, provided that the payments satisfy the requirements of this section. Except in the case of a qualified longevity annuity contract (QLAC) described in paragraph (q) of this section, if the annuity contract is purchased after the required beginning date, then the first payment interval must begin on or before the purchase date and the payment that is made at the end of that payment interval is the amount required for one payment interval. If the payments actually made under the annuity contract do not meet the requirements of this section, the plan fails to satisfy section 401(a)(9). See also paragraph (o) of this section permitting certain increases under annuity contracts.

(e) *Treatment of additional accruals*—(1) *General rule.* If additional benefits accrue in a calendar year after the employee's first distribution calendar year, distribution of the amount that accrues in that later calendar year must commence in accordance with paragraph (a) of this section beginning with the first payment interval ending in the calendar year immediately following the calendar year in which that amount accrues.

(2) *Administrative delay.* A plan will not fail to satisfy this section merely because there is an administrative delay in the commencement of the distribution of the additional benefits accrued in a calendar year, provided that—

(i) The payment commences no later than the end of the first calendar year following the calendar year in which the additional benefit accrues; and

(ii) The total amount paid during that first calendar year with respect to those additional benefits is no less than the total amount that was required to be paid during that year under paragraph (e)(1) of this section.

(f) *Treatment of nonvested benefits.* In the case of annuity distributions under a defined benefit plan, if any portion of the employee's benefit is not vested as of December 31 of a distribution calendar year, the portion that is not vested as of that date is treated as not having accrued for purposes of determining the required minimum distribution for that distribution calendar year. When an additional portion of the employee's benefit becomes vested, that portion will be treated as an additional accrual. See paragraph (e) of this section for the rules for distributing benefits that accrue under a defined benefit plan after the employee's first distribution calendar year.

(g) *Requirement for actuarial increase*—(1) *General rule*—(i) *Applicability of increase.* Except as otherwise provided in this paragraph (g), if an employee retires after the calendar year in which the employee attains age 70½, then, in order to satisfy section 401(a)(9)(C)(iii), the employee's accrued benefit under a defined benefit plan must be actuarially increased for the period (if any) from the start date described in paragraph (g)(1)(ii) of this section to the end date described in paragraph (g)(1)(iii) of this section.

(ii) *Start date for actuarial increase.* The start date for the required actuarial increase is April 1 following the calendar year in which the employee attains age 70½0 (or January 1, 1997, if the employee attained 70½ prior to January 1, 1997).

(iii) *End date for actuarial increase.* The end date for the required actuarial increase is the date on which benefits commence after retirement in a form that satisfies paragraphs (a) and (h) of this section.

(iv) *Determination of when employee attains age 70½.* See § 1.401(a)(9)–2(b)(2)(ii) for the determination of the calendar year in which an employee attains age 70½.

(2) *Nonapplication to 5-percent owners.* This paragraph (g) does not apply to an employee if that employee is a 5-percent owner (as defined in section 416) with respect to the plan year ending in the calendar year in which the employee attains age 72.

(3) *Nonapplication to governmental and church plans.* The actuarial increase required under this paragraph (g) does not apply to a governmental plan (within the meaning of section 414(d)) or a church plan. For purposes of this paragraph (g)(3)—

(i) The term *church plan* means a plan maintained by a church for church employees;

(ii) The term *church* means a church (as defined in section 3121(w)(3)(A)) or a qualified church-controlled organization (as defined in section 3121(w)(3)(B)); and

(iii) The determination of whether an employee is a church employee is made without regard to section 414(e)(3)(B).

(h) *Amount of actuarial increase*—(1) *In general.* In order to satisfy section 401(a)(9)(C)(iii), the retirement benefits payable with respect to an employee as of the end of the period for which actuarial increases must be provided as described in paragraph (g) of this section must be no less than—

(i) The actuarial equivalent of the employee's retirement benefits that would have been payable as of the start date described in paragraph (g)(1)(ii) of this section if benefits had commenced on that date; plus

(ii) The actuarial equivalent of any additional benefits accrued after that date; reduced by

(iii) The actuarial equivalent of any distributions made with respect to the employee's retirement benefits after that date.

(2) *Actuarial equivalence basis.* For purposes of this paragraph (h), actuarial equivalence is determined using the plan's assumptions for determining actuarial equivalence for purposes of satisfying section 411.

(3) *Coordination with section 411 actuarial increase.* In order for any of an employee's accrued benefit to be nonforfeitable as required under section 411, a defined benefit plan must make an actuarial adjustment to an accrued benefit, the payment of which is deferred past normal retirement age. The only exception to this rule is that, generally, no actuarial adjustment is required to reflect the period during which a benefit is suspended as permitted under section 411(a)(3)(B). The actuarial increase required under section 401(a)(9)(C)(iii) for the period (if any) described in paragraph (g)(1)(i) of this section generally is the same as, and not in addition to, the actuarial increase required for the same period under section 411 to reflect any delay in the payment of retirement benefits after normal retirement age. However, unlike the actuarial increase required under section 411, the actuarial increase required under section 401(a)(9)(C)(iii) must be provided even during any period during which an employee's benefit has been suspended in accordance with section 411(a)(3)(B).

(i) [Reserved]

(j) *Distributions restricted pursuant to section 436*—(1) *General rule.* If an employee's entire interest is being distributed in accordance with the 5-year rule of section 401(a)(9)(B)(ii), a plan is not treated as failing to satisfy section 401(a)(9) merely because of the application of a payment restriction under section 436(d), provided that distributions of the employee's interest commence by the end of the calendar year that includes the fifth anniversary of the date of the employee's death and, after the annuity starting date, those distributions are paid in a form that is as accelerated as permitted under section 436(d), as described in paragraph (j)(2) or (j)(3) of this section.

(2) *Payments restricted under section 436(d)(3).* If the payment restriction of section 436(d)(3) applies at the time benefits commence under paragraph (j)(1) of this section, then distributions are made in a form that is as accelerated as permitted under section 436(d) if the benefits are paid in a single-sum payment equal to the maximum amount allowed under section 436(d)(3), with the remainder paid as a life annuity to the beneficiary (or over the course of 240 months pursuant to § 1.436–1(j)(6)(ii) in the case of a beneficiary that is not an individual), subject to a requirement that the benefit remaining is commuted to a single-sum payment when the section 436(d)(3) payment restriction ceases to apply (to the extent that a single-sum payment is permitted under section 436(d)(1) and 436(d)(2)).

(3) *Payments restricted under section 436(d)(1) or (2).* If a plan is subject to the payment restriction in section 436(d)(1) or (2) at the time benefits commence under paragraph (j)(1) of this section, then distributions are made in a form that is as accelerated as permitted under section 436(d) if the benefits are paid in the form of a life annuity to the beneficiary (or over the course of 240 months pursuant to § 1.436–1(j)(6)(ii), in the case of a beneficiary that is not an individual), subject to a requirement that the benefit remaining is commuted to a single-sum payment to the extent permitted under section 436(d) (for example, the maximum amount allowed under section 436(d)(3)) when the payment restriction under section 436(d)(1) or (2) ceases to apply.

(k) *Treatment of early commencement*—(1) *General rule.* Generally, the determination of whether a stream of payments satisfies the requirements of this section is made as of the required beginning date. However, if distributions start prior to the required beginning date in a distribution form that is an annuity under which distributions are made in accordance with the provisions of paragraph (a) of this section and are made over a period permitted under section 401(a)(9)(A)(ii), then, except as provided in this paragraph (k), the annuity starting date will be treated as the required beginning date for purposes of applying the rules of this section and § 1.401(a)(9)–2. Thus, for example, the determination of the designated beneficiary and the amount of distributions will be made as of the annuity starting date. Similarly, if the employee dies after the annuity starting date but before the required beginning date determined under § 1.401(a)(9)–2(b), then after the employee's death—

(i) The remaining portion of the employee's interest must continue to be distributed in accordance with this section over the remaining period over which distributions commenced; and

(ii) The rules in § 1.401(a)(9)–3 relating to death before the required beginning date do not apply.

(2) *Joint and survivor annuity, nonspouse beneficiary*—(i) *Application of MDIB requirement.* If distributions commence in the form of a joint and survivor annuity for the lives of the employee and a beneficiary other than the employee's spouse, and as of the employee's birthday in the calendar year that includes the annuity starting date, the employee is under age 72, then the MDIB requirement will not be satisfied as of the date distributions commence unless, under the distribution option, the annuity payments to be made on and after the employee's required beginning date satisfy the conditions of this paragraph (k)(2). The periodic annuity payments payable to the survivor satisfy this paragraph (k)(2) if, at all times on and after the employee's annuity starting date, those payments do not exceed the applicable percentage of the periodic annuity payment payable to the employee using the table in paragraph (b)(3)(ii) of this section, but based on the adjusted employee/beneficiary age difference. The adjusted employee/beneficiary age difference is determined by first calculating the employee/beneficiary age difference under paragraph (b)(3)(i) of this section and then reducing that age difference by the number of years by which the employee is younger than age 72 on the employee's birthday in the calendar year that includes the annuity starting date. In the case of an annuity that provides for increasing payments, the requirement of this paragraph (k)(2) will not fail to be satisfied merely because benefit payments to the beneficiary increase, provided the increase is determined in the same manner for the employee and the beneficiary.

(ii) *Example*—(A) *Facts.* Distributions commence on January 1, 2023 to an employee (Z), born March 1, 1957, after retirement at age 65. Z's daughter (Y), born February 5, 1987, is Z's beneficiary. The distributions are in the form of a joint and survivor annuity for the lives of Z and Y with payments of $500 a month to Z and upon Z's death of $500 a month to Y (so that the monthly payment to Y is 100 percent of the monthly amount payable to Z).

(B) *Analysis and conclusion.* Under paragraph (k)(1) of this section, because distributions commence prior to Z's required beginning date and are in the form of a joint and survivor annuity for the lives of Z and Y, compliance with the rules of this section is determined as of the annuity starting date. Under this paragraph (k)(2), the adjusted employee/beneficiary age difference is calculated by taking the excess of the employee's age over the beneficiary's age and subtracting the number of years the employee is younger than age 72. In this case, Z is 30 years older than Y and is commencing benefits 6 years before attaining age 72, so the adjusted employee-beneficiary age difference is 24 years. Under the table in paragraph (b)(3)(ii) of this section, the applicable percentage for a 24-year adjusted employee/beneficiary age difference is 67 percent. The plan does not satisfy the MDIB requirement because, as of January 1, 2023 (the annuity starting date), the distribution option provides that, as of Z's required beginning date, the monthly payment to Y upon Z's death will exceed 67 percent of Z's monthly payment.

(3) *Limitation on period certain.* If, as of the employee's birthday in the calendar year that includes the annuity starting date, the employee is under age 72, then the period certain may not exceed the limitation on the period certain for an individual who is age 72 as specified in paragraph (c)(1) of this section, increased by the excess of 72 over the age of the employee on that birthday.

(l) *Early commencement for surviving spouse.* Generally, the determination of whether a stream of payments satisfies the requirements of this section is made as of the date on which distributions are required to commence. However, if the employee dies prior to the required beginning date, distributions commence to the surviving spouse of an employee over a period permitted under section 401(a)(9)(B)(iii)(II) prior to the date on which distributions are required to commence, and the distribution form is an annuity under which distributions are made in accordance with the provisions of paragraph (a) of this section, then the annuity starting date will be considered the required beginning date for purposes of section 401(a)(9)(B)(iv)(II). Thus, if the surviving spouse dies after commencing benefits and before the date described in 401(a)(9)(B)(iv)(II), then after the surviving spouse's death—

(1) The annuity distributions must continue to be made in accordance with paragraph (a) of this section over the remaining period over which distributions commenced; and

(2) The rules in § 1.401(a)(9)–3(e)(1) relating to the death of the surviving spouse before the required beginning date under section 401(a)(9)(B)(iv)(II) will not apply upon the death of the surviving spouse.

(m) *Determination of entire interest under annuity contract*—(1) *General rule.* Prior to the date that an annuity contract under an individual account plan is annuitized, the interest of an employee or beneficiary under that contract is treated as an individual account for purposes of section 401(a)(9). Thus, the required minimum distribution for any year with respect to that interest is determined under § 1.401(a)(9)–5 rather than this section. See § 1.401(a)(9)–5(a)(5) for rules relating to the satisfaction of section 401(a)(9) in the year that annuity payments commence, § 1.401(a)(9)–5(c)(4) for rules relating to QLACs (as defined in paragraph (q) of this section), and § 1.401(a)(9)–5(a)(5)(iii) for rules relating to the purchase of an annuity contract with a portion of an employee's account balance.

(2) *Entire interest.* For purposes of applying the rules in § 1.401(a)(9)–5, the entire interest under the annuity contract as of December 31 of the relevant valuation calendar year is treated as the account balance for the valuation calendar year described in § 1.401(a)(9)–5(c). The entire interest under an annuity contract is the dollar amount credited to the employee or beneficiary under the contract plus the actuarial present value of any additional benefits (for example, survivor benefits in excess of the dollar amount credited to the employee or beneficiary) that will be provided under the contract. However, paragraph (m)(3) of this section describes certain additional benefits that may be disregarded in determining the employee's entire interest under the annuity contract. The actuarial present value of any additional benefits described under this paragraph (m) is to be determined using reasonable actuarial assumptions, including reasonable assumptions as to future distributions, and without regard to an individual's health.

(3) *Exclusions*—(i) *Additional value does not exceed 20 percent.* The actuarial present value of any additional benefits provided under an annuity contract described in paragraph (m)(2) of this section may be disregarded if the sum of the dollar amount credited to the employee or beneficiary under the contract and the actuarial present value of the additional benefits is no more than 120 percent of the dollar amount credited to the employee or beneficiary under the contract and the additional benefits are one or both of the following—

(A) Additional benefits that, in the case of a distribution, are reduced by an amount sufficient to ensure that the ratio of the sum to the dollar amount credited does not increase as a result of the distribution, and

(B) An additional benefit that is the right to receive a final payment upon death that does not exceed the excess of the premiums paid less the amount of prior distributions.

(ii) *Return of premium death benefit.* If the only additional benefit provided under the contract is the additional benefit described in paragraph (m)(3)(i)(B) of this section, the additional benefit may be disregarded regardless of its value in relation to the dollar amount credited to the employee or beneficiary under the contract.

(iii) *Additional guidance.* The Commissioner, in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter), may provide additional guidance on additional benefits that may be disregarded.

(4) *Examples.* The examples in this paragraph (m)(4), which use a 5 percent interest rate and the mortality table used for distributions subject to section 417(e)(3) provided in Notice 2019–67, 2019–52 I.R.B. 1510, illustrate the application of the rules in this paragraph (m):

(i) *Example 1*—(A) *Facts.* G is the owner of a variable annuity contract (Contract S) under an individual account plan that has not been annuitized. Contract S provides a death benefit until the end of the calendar year in which the owner attains the age of 84 equal to the greater of the current Contract S notional account value (dollar amount credited to G under the contract) and the largest notional account value at any previous policy anniversary reduced proportionally for subsequent partial distributions (High Water Mark). Contract S provides a death benefit in calendar years after the calendar year in which the owner attains age 84 equal to the current notional account value. Contract S provides that assets within the contract may be invested in a Fixed Account at a guaranteed rate of 2 percent. Contract S provides no other additional benefits.

(B) *Actuarial calculations.* At the end of 2028, when G has an attained age of 78 and 9 months, the notional account value of Contract S (after the distribution for 2028 of 4.55% of the notional account value as of December 31, 2027) is $550,000, and the High Water Mark, before adjustment for any withdrawals from Contract S in 2028, is $1,000,000. Thus, Contract S will provide additional benefits (that is, the death benefits in excess of the notional account value) through 2034, the year S turns 84. The actuarial present value of these additional benefits at the end of 2028 is determined to be $67,978 (12 percent of the notional account value). In making this determination, the following assumptions are made: On average, deaths occur mid-year; the investment return on G's notional account value is 2 percent per annum; and minimum required distributions (determined without regard to additional benefits under the Contract S) are made at the end of each year. The following two tables summarize the actuarial methodology used in determining the actuarial present value of the additional benefit.

TABLE 2—APPLICABLE TO PARAGRAPH (m)(4)(i)(B)

Year	Death benefit during year	End-of-year notional account before withdrawal	Average notional account	Withdrawal at end of year	End-of-year notional account after withdrawal
2028	$1,000,000	....	....	....	$550,000
2029	[1] 954,545	[2] $561,000	[3] $555,500	[4] $26,606	534,934
2030	909,306	545,633	540,283	26,482	519,151
2031	864,291	529,534	524,342	26,760	502,774
2032	819,740	512,829	507,801	27,177	485,652
2033	775,430	495,365	490,509	27,438	467,927
2034	731,620	477,286	472,606	27,853	449,433

[1] $1,000,000 death benefit reduced 4.55 percent for withdrawal during 2028.
[2] Notional account value at end of preceding year (after distribution) increased by 2 percent return for year.
[3] Average of $550,000 notional account value at end of preceding year (after distribution) and $561,000 notional account value at end of current year (before distribution).
[4] December 31, 2028 notional account (before distribution) divided by uniform lifetime table age 79 factor of 21.1.

TABLE 3—APPLICABLE TO PARAGRAPH (m)(4)(i)(B)

Year	Survivorship to start of year	Interest discount to end of 2028	Mortality rate during year	Discounted additional benefits within year
2028				
2029	1.00000	.97590	[5].03321	12,933
2030	.96679	[6].92943	.03739	[7]12,398
2031	[8].93064	.88517	.04198	11,756
2032	.89157	.84302	.04715	11,055
2033	.84953	.80288	.05305	10,310
2034	.80446	.76464	.05979	9,526
				67,978

[5] One-quarter age 78 rate plus three-quarters age 79 rate.
[6] Five percent discounted 18 months $(1.05^{(-1.5)})$.
[7] Blended age 79/age 80 mortality rate (.03739) multiplied by the $369,023 excess of death benefit over the average notional account value ($909,306 less $540,283) multiplied by .96679 probability of survivorship to the start of 2030 multiplied by 18-month interest discount of .92943.
[8] Survivorship to start of preceding year (.96679) multiplied by probability of survivorship during prior year (1-.03739).

(C) *Conclusion.* Because Contract S provides that, in the case of a distribution, the value of the additional death benefit (which is the only additional benefit available under the contract) is reduced by an amount that is at least proportional to the reduction in the notional account value and, at age 78 and 9 months, the sum of the notional account value (dollar amount credited to the employee under the contract) and the actuarial present value of the additional death benefit is no more than 120 percent of the notional account value, the exclusion under paragraph (m)(2)(iii)(B) of this section is applicable for 2029. Therefore, for purposes of applying the rules in § 1.401(a)(9)–5, the entire interest under Contract S may be determined as the notional account value (that is, without regard to the additional death benefit).

(ii) *Example 2*—(A) *Facts.* The facts are the same as in *Example 1* in paragraph (m)(4)(i) of this section except that the notional account value is $550,000 at the end of 2028. In this instance, the actuarial present value of the death benefit in excess of the notional account value in 2028 is determined to be $97,273 (24 percent of the notional account value). The following two tables summarize the actuarial methodology used in determining the actuarial present value of the additional benefit.

TABLE 4—APPLICABLE TO PARAGRAPH (m)(4)(ii)(A)

Year	Death benefit during year	End-of-year notional account before withdrawal	Average notional account	Withdrawal at end of year	End-of-year notional account after withdrawal
2028	$1,000,000				$400,000
2029	954,545	$408,000	$404,000	$18,957	389,043
2030	909,306	396,824	392,933	19,260	377,564
2031	864,291	385,115	381,339	19,462	365,653
2032	819,740	372,966	369,310	19,765	353,201
2033	775,430	360,265	356,733	19,955	340,310
2034	731,620	347,116	343,713	20,257	326,859

TABLE 5—APPLICABLE TO PARAGRAPH (m)(4)(ii)(A)

Year	Survivorship to start of year	Interest discount to end of 2028	Mortality rate during year	Discounted additional benefits within year
2028				
2029	1.00000	.97590	.03321	$17,843
2030	.96679	.92943	.03739	17,349
2031	.93064	.88517	.04198	16,701
2032	.89157	.84302	.04715	15,963
2033	.84953	.80288	.05305	15,150
2034	.80446	.76464	.05979	14,267
				97,273

(B) *Conclusion.* Because the sum of the notional account balance and the actuarial present value of the additional death benefit is more than 120 percent of the notional account value, the exclusion under paragraph (m)(3)(i) of this section does not apply for 2029. Therefore, for purposes of applying the rules in § 1.401(a)(9)–5, the entire interest under Contract S must include the actuarial present value of the additional death benefit.

(n) *Change in annuity payment period*—(1) *In general.* An annuity payment period may be changed in accordance with the reannuitization provisions set forth in paragraph (n)(2) of this section or in association with an annuity payment increase described in paragraph (o) of this section.

(2) *Reannuitization.* If, in a stream of annuity payments that otherwise satisfies section 401(a)(9), the annuity payment period is changed and the annuity payments are modified in association with that change, this modification will not cause the distributions to fail to satisfy section 401(a)(9) provided the conditions set forth in paragraph (n)(3) of this section are satisfied, and—

(i) The modification occurs at the time that the employee retires or in connection with a plan termination;

(ii) The annuity payments prior to modification are annuity payments paid over a period certain without life contingencies; or

(iii) The annuity payments after modification are paid under a qualified joint and survivor annuity over the joint lives of the employee and a designated beneficiary, the employee's spouse is the sole beneficiary, and the modification occurs in connection with the employee becoming married to that spouse.

(3) *Conditions.* In order to modify a stream of annuity payments in accordance with paragraph (n)(2) of this section, the following conditions must be satisfied—

(i) The future payments under the modified stream satisfy section 401(a)(9) and this section (determined by treating the date of the change as a new annuity starting date and the actuarial present value of the remaining payments prior to modification as the entire interest of the participant);

(ii) For purposes of sections 415 and 417, the modification is treated as a new annuity starting date;

(iii) After taking into account the modification, the annuity stream satisfies section 415 (determined at the original annuity starting date, using the interest rates and mortality tables applicable to that date); and

(iv) The end point of the period certain, if any, for any modified payment period is not later than the end point available under section 401(a)(9) to the employee at the original annuity starting date.

(4) *Examples.* For the purposes of the examples in this paragraph (n)(4), assume that the applicable segment rates under section 417(e)(3) are 1.00%, 3.00%, and 4.00%, and the Applicable Mortality Table under section 417(e)(3) is the mortality table provided in Notice 2020–85, 2020–51 I.R.B. 1645. In addition, assume that the section 415 limit at age 72 for a straight life annuity is $280,000 (which is the lesser of the annual benefit under section 415(b)(1)(A), as adjusted pursuant to section 415(d) and further adjusted for age 72 in accordance with § 1.415(b)–1(e)(1)(i), and 100% of the participant's average compensation for the participant's high 3 years):

(i) *Example 1*—(A) *Facts*—(*1*) *Background.* Participant D has 10 years of participation in a frozen defined benefit plan (Plan W). D is not retired and elects to receive distributions from Plan W in the form of a straight life (that is level payment) annuity with annual payments of $215,000 per year beginning in 2025 at a date when D has an attained age of 72. Plan W offers non-retired employees in pay status the opportunity to modify their annuity payments due to an associated change in the payment period at retirement. Plan W treats the date of the change in payment period as a new annuity starting date for purposes of sections 415 and 417. Thus, for example, the plan provides a new qualified and joint survivor annuity election and obtains spousal consent. Plan W determines modifications of annuity payment amounts at retirement so that the present value of future new annuity payment amounts (taking into account the new associated payment period) is actuarially equivalent to the present value of future pre-modification annuity payments (taking into account the pre-modification annuity payment period). Actuarial equivalency for this purpose is determined using the applicable segment rates under section 417(e)(3)(C) and the Applicable Mortality Table as of the date of modification.

(*2*) *Payment of retirement benefits to Participant D.* D retires in 2029 at the age of 76 and, after receiving four annual payments of $215,000, elects to receive the remaining distributions from Plan W in the form of an immediate final lump sum payment of $2,316,180. Because payment of retirement benefits in the form of an immediate final lump sum payment satisfies (in terms of form) section 401(a)(9), the condition under paragraph (n)(3)(i) of this section is met.

(B) *Analysis.* Because Plan W treats a modification of an annuity payment stream at retirement as a new annuity starting date for purposes of sections 415 and 417, the condition under paragraph (n)(3)(ii) of this section is met. After taking into account the modification, the annuity stream determined as of the original annuity starting date consists of annual payments beginning at age 72 of $215,000, $215,000, $215,000, $215,000, and $2,316,180. This benefit stream is actuarially equivalent to a straight life annuity at age 72 of $276,768, calculated in accordance with section 415(b)(2)(E)(ii), which is an amount less than the section 415 limit determined at the original annuity starting date. Thus, the condition under paragraph (n)(3)(iii) of this section is met.

(C) *Conclusion.* Because a stream of annuity payments in the form of a straight life annuity satisfies section 401(a)(9), and because each of the conditions under paragraph (n)(3) of this section are satisfied, the modification of annuity payments to D described in this example meets the requirements of this paragraph (n).

(ii) *Example 2*—(A) *Facts.* The facts are the same as in *Example 1* in paragraph (n)(4)(i) of this section except that the straight life annuity payments are paid at a rate of $230,000 per year and after D retires the lump sum payment at age 76 is $2,477,774. Thus, after taking into account the modification, the annuity stream determined as of the original annuity starting date consists of annual payments beginning at age 72 of $230,000, $230,000, $230,000, $230,000, and $2,477,774.

(B) *Conclusion.* The benefit stream described in paragraph (n)(4)(ii)(A) of this section is actuarially equivalent to a straight life annuity at age 72 of $296,078, calculated in accordance with section 415(b)(2)(E)(ii), which exceeds the section 415 limit determined at the original annuity starting date. Thus, the lump sum payment to D fails to satisfy the condition under paragraph (n)(3)(iii) of this section. Therefore, the lump sum payment to D fails to meet the requirements of this paragraph (n) and fails to satisfy the requirements of section 401(a)(9).

(iii) *Example 3*—(A) *Facts*—(*1*) *Background.* Participant E has 10 years of participation in Plan X, a frozen defined benefit plan. E retires in 2025 at a date when E's attained age is 72. E elects to receive annual distributions from Plan X in the form of a 27-year period certain annuity (that is, a 27-year annuity payment period without a life contingency) paid at a rate of $37,000 per year beginning in 2025 with future payments increasing at a rate of 4.00% per year (that is, the 2026 payment will be $38,480, the 2027 payment will be $40,019 and so on). Plan X offers participants in pay status whose annuity payments are in the form of a term-certain annuity the opportunity to modify their payment period at any time and treats the modifications as a new annuity starting date for the purposes of sections 415 and 417. Thus, for example, the plan provides a new qualified and joint survivor annuity election and obtains spousal consent.

(*2*) *Plan provisions for determination of actuarial equivalence.* Plan X determines modifications of annuity payment amounts so that the present value of future new annuity payment amounts (taking into account the new associated payment period) is actuarially equivalent to the present value of future pre-modification annuity payments (taking into account the pre-modification annuity payment period). Actuarial equivalency for this purpose is determined using 5.00% and the Applicable Mortality Table as of the date of modification.

(*3*) *Modification of retirement benefits paid to Participant E.* In 2028, E, after receiving annual payments of $37,000, $38,480, and $40,019, elects to receive the remaining distributions from Plan W in the form of a straight life annuity paid with annual payments of $92,133 per year.

(B) *Analysis.* Because payment of retirement benefits in the form of a straight life annuity satisfies (in terms of form) section 401(a)(9), the condition under paragraph (n)(3)(i) of this section is met. Because Plan X treats a modification of an annuity payment stream at retirement as a new annuity starting date for purposes of sections 415 and 417, the condition under paragraph (n)(3)(ii) of this section is met. After taking into account the modification, the annuity stream determined as of the original annuity starting date consists of annual payments beginning at age 72 of $37,000, $38,480, and $40,019, and a straight life annuity beginning at age 75 of $92,133. This benefit stream is actuarially equivalent to a straight life annuity at age 72 of $81,940, calculated in accordance with section 415(b)(2)(E)(i), which is an amount less than the section 415 limit determined at the original annuity starting date. Thus, the condition under paragraph (n)(3)(iii) of this section is met.

(C) *Conclusion.* Because a stream of annuity payments in the form of a straight life annuity satisfies section 401(a)(9), and each of the conditions under paragraph (n)(3) of this section are satisfied, the modification of annuity payments to E meets the requirements of this paragraph (n).

(o) *Increase in annuity payments*—(1) *General rules.* Notwithstanding the general rule under paragraph (a)(1) of this section prohibiting increases in annuity payments, the following increases in annuity payments are permitted—

(i) An annual percentage increase that does not exceed the percentage increase in an eligible cost-of-living index (as defined in paragraph (o)(2) of this section) for a 12-month period ending in the year during which the increase occurs or the prior year;

(ii) A percentage increase that occurs at specified times (for example, at specified ages) and does not exceed the cumulative total of annual percentage increases in an eligible cost-of-living index (as defined in paragraph (o)(2) of this section) after the annuity starting date, or if later, the date of the most recent percentage increase;

(iii) An increase eliminating some or all of the reduction in the amount of the employee's payments to provide for a survivor benefit, but only if there is no longer a survivor benefit because the beneficiary whose life was being used to determine the period described in section 401(a)(9)(A)(ii) over which payments were being made dies or is no longer the employee's beneficiary pursuant to a qualified domestic relations order within the meaning of section 414(p);

(iv) An increase to pay increased benefits that result from a plan amendment;

(v) An increase to allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a single-sum distribution upon the employee's death;

(vi) An increase to the extent permitted in accordance with paragraph (o)(3), (4), or (5) of this section; or

(vii) An increase resulting from the resumption of benefits that were suspended pursuant to section 411(a)(3)(B), section 418E, or section 432(e)(9).

(2) *Eligible cost of living index*—(i) *In general.* For purposes of this paragraph (o), an eligible cost-of-living index means an index described in paragraph (o)(2)(ii), (iii), or (iv) of this section.

(ii) *Consumer Price Index.* An index is described in this paragraph (o)(2)(ii) if it is a consumer price index that is based on prices of all items (or all items excluding food and energy) and issued by the Bureau of Labor Statistics, including an index for a specific population (for example, urban consumers or urban wage earners and clerical workers) and an index for a geographic area or areas (for example, a metropolitan area or State).

(iii) *Consumer price index with banking.* An index is described in this paragraph (o)(2)(iii) if it is a percentage adjustment based on a cost-of-living index described in paragraph (o)(2)(ii) of this section, or a fixed percentage if less. In any year when the cost-of-living index is lower than the fixed percentage, the fixed percentage may be treated as an increase in an eligible cost-of-living index, provided it does not exceed the sum of—

(A) The cost-of-living index for that year, and

(B) The accumulated excess of the annual cost-of-living index from each prior year over the fixed annual percentage used in that year (reduced by any amount previously utilized under this paragraph (o)(2)(iii)(B)).

(iv) *Adjustment based on compensation for position.* An index is described in this paragraph (o)(2)(iv) if it is a percentage adjustment based on the increase in compensation for the position held by the employee at the time of retirement, and provided under either—

(A) The terms of a governmental plan (within the meaning of section 414(d)), or

(B) The terms of a nongovernmental plan, as in effect on April 17, 2002.

(3) *Additional permitted increases for certain annuity contracts purchased from insurance companies.* In the case of payments paid from an annuity contract purchased from an insurance company, if the total future expected payments (determined in accordance with paragraph (o)(6)(iii) of this section) exceed the total value being annuitized (within the meaning of paragraph (o)(6)(i) of this section), the payments under the contract will not fail to satisfy the nonincreasing payment requirement in paragraph (a)(1) of this section merely because the payments are increased in accordance with one or more of the following—

(i) By a constant percentage, applied not less frequently than annually;

(ii) As a result of dividend payments or other payments that result from actuarial gains (within the meaning of paragraph (o)(6)(ii) of this section), but only if actuarial gain is measured no less frequently than annually and the resulting dividend payments or other payments are either paid no later than the year following the year for which the actuarial experience is measured or paid in the same form as the payment of the annuity over the remaining period of the annuity (beginning no later than the year following the year for which the actuarial experience is measured); and

(iii) An acceleration of payments under the annuity (within the meaning of paragraph (o)(6)(iv) of this section).

(4) *Additional permitted increases for all annuity contracts purchased from insurance companies.* Payments made from an annuity contract purchased

from an insurance company will not fail to satisfy the nonincreasing payment requirement in paragraph (a)(1) of this section merely because the payments are increased in accordance with one or more of the following—

(i) To provide a final payment upon the death of the employee that does not exceed the excess of total value being annuitized (within the meaning of paragraph (a)(5)(i) of this section) over the total of payments before the death of the employee;

(ii) To provide an acceleration of payments (within the meaning of paragraph (o)(6)(iv) of this section) that is required to comply with § 1.401(a)(9)–5(e); or

(iii) To provide a short-term acceleration of payments under the annuity, under which up to one year of annuity payments that would otherwise satisfy the requirements of this section are paid in advance of when the payments were scheduled to be made.

(5) *Additional permitted increases for annuity payments from a qualified trust.* Annuity payments made under a defined benefit plan qualified under section 401(a) (other than annuity payments under an annuity contract purchased from an insurance company that satisfy paragraph (a)(3) of this section) will not fail to satisfy the nonincreasing payment requirement in paragraph (a)(1) of this section merely because the payments are increased in accordance with one of the following—

(i) By a constant percentage, applied not less frequently than annually, at a rate that is less than 5 percent per year;

(ii) To provide a final payment upon the death of the employee that does not exceed the excess of the actuarial present value of the employee's accrued benefit (within the meaning of section 411(a)(7)) calculated as of the annuity starting date using the applicable interest rate and the applicable mortality table under section 417(e) (or, if greater, the total amount of employee contributions plus interest) over the total of payments before the death of the employee; or

(iii) As a result of dividend payments or other payments that result from actuarial gains (within the meaning of paragraph (o)(6)(ii) of this section), but only if—

(A) Actuarial gain is measured no less frequently than annually;

(B) The resulting dividend payments or other payments are either paid no later than the year following the year for which the actuarial experience is measured or paid in the same form as the payment of the annuity over the remaining period of the annuity (beginning no later than the year following the year for which the actuarial experience is measured);

(C) The actuarial gain taken into account is limited to the actuarial gain from investment experience;

(D) The assumed interest used to calculate actuarial gains is not less than 3 percent; and

(E) The payments are not increasing by a constant percentage as described in paragraph (o)(5)(i) of this section.

(6) *Definitions.* For purposes of this paragraph (o), the following definitions apply—

(i) *Total value being annuitized.* Total value being annuitized means:

(A) In the case of annuity payments under a section 403(a) annuity plan or under a deferred annuity purchased by a section 401(a) trust, the value of the employee's entire interest (within the meaning of paragraph (m) of this section) being annuitized (valued as of the date the contract is annuitized);

(B) In the case of annuity payments under an immediate annuity contract purchased by a trust for a defined benefit plan qualified under section 401(a), the amount of the premium used to purchase the contract; and

(C) In the case of a defined contribution plan, the value of the employee's account balance used to purchase an immediate annuity under the contract.

(ii) *Actuarial gain.* Actuarial gain means the difference between an amount determined using the actuarial assumptions (that is, investment return, mortality, expense, and other similar assumptions) used to calculate the initial payments before adjustment for any increases and the amount determined under the actual experience with respect to those factors. Actuarial gain also includes differences between the amount determined using actuarial assumptions when an annuity was purchased or commenced, and the amount determined using actuarial assumptions used in calculating payments at the time the actuarial gain is determined.

(iii) *Total future expected payments.* Total future expected payments means the total future payments expected to be made under the annuity contract as of the date the contract is annuitized, based on the mortality rates contained in § 1.401(a)(9)–9(e).

(iv) *Acceleration of payments.* Acceleration of payments means a shortening of the payment period with respect to an annuity or a full or partial commutation of the future annuity payments. An increase in the payment amount will be treated as an acceleration of payments in the annuity only if the total future expected payments under the annuity (including the amount of any payment made as a result of the acceleration) is decreased as a result of the change in payment period.

(7) *Examples.* This paragraph (o) is illustrated by the following examples.

(i) *Example 1. Variable annuity*—(A) *Facts.* A retired participant (Z1) in Plan X, a defined contribution plan, attains age 72 in 2021. Z1 elects to purchase Contract Y1 from Insurance Company W in 2021. Contract Y1 is a single life annuity contract with a 10-year period certain. Contract Y1 provides for an initial annual payment calculated with an assumed interest rate (AIR) of 3 percent. Subsequent payments are determined by multiplying the prior year's payment by a fraction, the numerator of which is 1 plus the actual return on the separate account assets underlying Contract Y1 since the preceding payment and the denominator of which is 1 plus the AIR during that period. The value of Z1's account balance in Plan X at the time of purchase is $105,000, and the purchase price of Contract Y1 is $105,000. Contract Y1 provides Z1 with an initial payment of $7,200 at the time of purchase in 2021.

(B) *Conclusion.* Based on the mortality rates in § 1.401(a)(9)–9(e), the total future expected payments to Z1 under Contract Y1 are $128,880. Because the total future expected payments on the date the contract is annuitized exceed the total value being annuitized and payments increase only as a result of actuarial gain, with increases from actuarial gain, beginning no later than the next year, paid in the same form as the payment of the annuity over the remaining period of the annuity, distributions received by Z1 from Contract Y1 meet the requirements of paragraph (o)(3)(ii) of this section.

(ii) *Example 2. Participating annuity*—(A) *Facts.* A retired participant (Z2) in Plan X, a defined contribution plan, attains age 72 in 2021. Z2 elects to purchase Contract Y2 from Insurance Company W in 2021. Contract Y2 is a participating single life annuity contract with a 10-year period certain. Contract Y2 provides for level annual payments with dividends paid in a lump sum in the year after the year for which the actuarial experience is measured or paid out levelly beginning in the year after the year for which the actuarial gain is measured over the remaining lifetime and period certain, that is, the period certain ends at the same time as the original period certain. Dividends are determined annually by the Board of Directors of Company W based upon a comparison of actual actuarial experience to expected actuarial experience in the past year. The value of Z2's account balance in Plan X at the time of purchase is $265,000, and the purchase price of Contract Y2 is $265,000. Contract Y2 provides Z2 with an initial payment of $16,000 in 2021. Based on the mortality rates in § 1.401(a)(9)–9(e), the total future expected payments to Z2 under Contract Y2 are $286,400.

(B) *Conclusion.* Because the total future expected payments on the date the contract is annuitized exceed the total value being annuitized and payments increase only as a result of actuarial gain, with those increases, beginning no later than the next year, paid in the same form as the payment of the annuity over the remaining period of the annuity, distributions received by Z2 from Contract Y2 meet the requirements of paragraph (o)(3)(ii) of this section.

(iii) *Example 3. Participating annuity with dividend accumulation*—(A) *Facts.* The facts are the same as in *Example 2* in paragraph (o)(7)(ii) of this section except that the annuity provides a dividend accumulation option under which Z2 may defer receipt of the dividends to a time selected by Z2.

(B) *Conclusion.* Because the dividend accumulation option permits dividends to be paid later than the end of the year following the year for which the actuarial experience is measured or as a stream of payments that increase only as a result of actuarial gain, with those increases beginning no later than the next year, paid in the same form as the payment of the annuity in *Example 2* in paragraph (o)(7)(ii) of this section over the remaining period of the annuity, the dividend accumulation option does not meet the requirements of paragraph (o)(3)(ii) of this section. Neither does the dividend accumulation option fit within any of the other permissible increases described in paragraph (o)(3) of this section. Accordingly, the dividend accumulation option causes the contract, and consequently any distributions from the contract, to fail to meet the requirements of this paragraph (o) and thus to fail to satisfy the requirements of section 401(a)(9).

(iv) *Example 4. Participating annuity with dividends used to purchase additional death benefits*—(A) *Facts.* The facts are the same as in *Example 2* in paragraph (o)(7)(ii) of this section, except that the annuity provides an option under which actuarial gain under the contract is used to provide additional death benefit protection for Z2.

(B) *Conclusion.* Because this option permits payments as a result of actuarial gain to be paid later than the end of the year following the year for which the actuarial experience is measured or as a stream of payments that only increase as a result of actuarial gain, with increases as a result of actuarial gain beginning no later than the next year, paid in the same form as the payment of the annuity described in *Example 2* in paragraph (o)(7)(ii) of this section over the remaining period of the annuity, the option does not meet the requirements of paragraph (o)(3)(ii) of this section. Neither does the option fit within any of the other permissible increases described in paragraph (o)(3) of this section. Accordingly, the addition of the option causes the contract, and consequently any distributions from the contract, to fail to meet the requirements of this paragraph (o) and thus to fail to satisfy the requirements of section 401(a)(9).

(v) *Example 5. Annuity with a fixed percentage increase*—(A) *Facts.* A retired participant (Z3) in Plan X, a defined contribution plan, attains age 72 in 2021. Z3 elects to purchase Contract Y3 from Insurance Company W. Contract Y3 is a single life annuity contract with a 20-year period certain (which does not exceed the maximum period certain permitted under paragraph (c)(1) of this section) with fixed annual payments increasing 3 percent each year. The value of Z3's account balance in Plan X at the time of purchase is $110,000, and the purchase price of Contract Y3 is $110,000. Contract Y3 provides Z3 with an initial payment of $6,000 at the time of purchase in 2021. Based on the mortality rates in § 1.401(a)(9)–9(e), the total future expected payments to Z3 under Contract Y3 are $129,600.

(B) *Conclusion.* Because the total future expected payments on the date the contract is annuitized exceed the total value being annuitized and payments increase only as a constant percentage applied not less frequently than annually, distributions received by Z3 from Contract Y3 meet the requirements of paragraph (o)(3)(i) of this section.

(vi) *Example 6. Annuity with excessive percentage increase*—(A) *Facts.* The facts are the same as in *Example 5* in paragraph (o)(7)(v) of this section except that the initial payment is $5,000 and the annual rate of increase is 4 percent. In this example, based on the mortality rates in § 1.401(a)(9)–9(e), the total future expected payments are $108,000.

(B) *Conclusion.* Because the total future expected payments are less than the total value being annuitized (the $110,000 used to purchase Contract Y3), distributions received by Z3 do not meet the requirements of paragraph (o)(3) of this section, and thus fail to meet the requirements of section 401(a)(9).

(vii) *Example 7. Annuity with full commutation feature*—(A) *Facts.* A retired participant (Z4) in Plan X, a defined contribution plan, attains age 78 in 2021. Z4 elects to purchase Contract Y4 from Insurance Company W. Contract Y4 provides for a single life annuity with a 10-year period certain (which does not exceed the maximum period certain permitted under paragraph (c) of this section) with annual payments. Contract Y4 provides that Z4 may cancel Contract Y4 at any time before Z4 attains age 84, and receive, on the next payment due date, a final payment in an amount determined by multiplying the initial payment amount by a factor obtained from Table M of Contract Y4 using Z4's age as of Z4's birthday in the calendar year of the final payment. The value of Z4's account balance in Plan X at the time of purchase is $450,000, and the purchase price of Contract Y4 is $450,000. Contract Y4 provides Z4 with an initial payment in 2021 of $40,000. The factors in Table M are as follows:

TABLE 6—APPLICABLE TO PARAGRAPH (o)(7)(vii)(A)

Age at final payment	Factor
79	10.5
80	10.0
81	9.5
82	9.0
83	8.5
84	8.0

(B) *Determination of acceleration of payments.* Based on the mortality rates in § 1.401(a)(9)–9(e), the total future expected payments to Z4 under Contract Y4 are $560,000. Because the total future expected payments on the purchase date exceed the total value being annuitized (that is, the $450,000 used to purchase Contract Y4), the permitted increases set forth in paragraph (o)(3) of this section are available. Furthermore, because the factors in Table M are less than the present value factors at each of the ages based on the mortality rates in § 1.401(a)(9)–9(e), the final payment is always less than the total future expected payments. Thus, the final payment is an acceleration of payments within the meaning of paragraph (o)(3)(iii) of this section.

(C) *Application to cancellation immediately before attainment of age 84.* As an illustration of paragraph (o)(7)(vii)(B) of this section, if

Participant Z4 were to elect to cancel Contract Y4 on the day before Z4 was to attain age 84, the contractual final payment would be $320,000. This amount is determined as $40,000 (the annual payment amount due under Contract Y4) multiplied by 8.0 (the factor in Table M for the next payment due date, age 84). Based on the mortality rates in § 1.401(a)(9)–9(e), the total future expected payments under Contract Y4 at age 84 before the final payment is $360,000. Because $320,000 (the contractual final payment) is less than $360,000 (the total future expected payments under the annuity contract, determined before the election), the final payment is an acceleration of payments within the meaning of paragraph (o)(3)(iii) of this section.

(viii) *Example 8. Annuity with partial commutation feature*—(A) *Facts.* The facts are the same as in *Example 7* in paragraph (o)(7)(vii) of this section except that the annuity provides that Z4 may request, at any time before Z4 attains age 84, an ad hoc payment on his next payment due date with future payments reduced by an amount equal to the ad hoc payment divided by the factor obtained from Table M (from paragraph (o)(7)(vii) of this section) corresponding to Z4's age at the time of the ad hoc payment.

(B) *Analysis and conclusion.* Because, at each age, the factors in Table M are less than the corresponding present value factors based on the mortality rates in § 1.401(a)(9)–9(e), total future expected payments under Contract Y4 will decrease after an ad hoc payment. Thus, ad hoc distributions received by Z4 from Contract Y4 will satisfy the requirements of paragraph (o)(3)(iii) of this section.

(C) *Application to ad hoc payment received immediately before attainment of age 84.* As an illustration of paragraph (o)(7)(viii)(A) of this section, if Z4 were to request, on the day before Z4 was to attain age 84, an ad hoc payment of $100,000 on the next payment due date, the recalculated annual payment amount would be reduced to $27,500. This amount is determined as $40,000 (the amount of Z4's next annual payment) reduced by $12,500 (the $100,000 ad hoc payment divided by the Table M factor at age 84 of 8.0). Thus, Z4's total future expected payments after the ad hoc payment (and including the $100,000 ad hoc payment), based on the mortality rates in § 1.401(a)(9)–9(e), are equal to $347,500. Note that this $347,500 amount is less than the amount of Z4's total future expected payments before the ad hoc payment, based on the mortality rates in § 1.401(a)(9)–9(e), of $360,000, and the requirements of paragraph (o)(3)(iii) of this section are satisfied.

(ix) *Example 9. Annuity with backloaded increases*—(A) *Facts.* A retired participant (Z5) in Plan X, a defined contribution plan, attains age 72 in 2021. Z5 elects to purchase annuity Contract Y5 from Insurance Company W in 2021 with a premium of $1,000,000. Contract Y5 is a single life annuity contract with a 20-year period certain. Contract Y5 provides for an initial payment of $200,000, a second payment one year from the time of purchase of $38,000, and 18 succeeding annual payments, each increasing at a constant percentage rate of 4.5 percent from the preceding payment.

(B) *Conclusion.* Contract Y5 fails to meet the requirements of section 401(a)(9) because the total future expected payments without regard to any increases in the annuity payment, based on the mortality rates in § 1.401(a)(9)–9(e), are only $982,800 (that is, an amount that does not exceed the total value used to purchase the annuity).

(p) *Payments to children*—(1) *In general.* Payments under a defined benefit plan or annuity contract that are made to an employee's child until the child reaches the age of majority as provided in paragraph (p)(2) of this section (or dies, if earlier) may be treated, for purposes of section 401(a)(9), as if the payments under the defined benefit plan or annuity contract were made to the surviving spouse to the extent they become payable to the surviving spouse upon cessation of the payments to the child. Thus, when payments described in this paragraph (p)(1) become payable to the surviving spouse because the child attains the age of majority, there is not an increase in benefits under paragraph (a) of this section. Likewise, the age of the child receiving the payments described in this paragraph (p)(1) is not taken into consideration for purposes of the MDIB requirement of paragraph (b) of this section.

(2) *Age of majority*—(i) *General rule.* Except as provided in paragraph (p)(2)(ii) of this section, the determination of when an employee's child attains the age of majority is made under the rules of § 1.401(a)(9)–4(e)(3).

(ii) *Exception for preexisting plan terms.* A defined benefit plan may apply a definition of the age of majority other than the definition in paragraph (p)(2)(i) of this section, but only if the plan terms regarding the age of majority—

(A) Were adopted on or before [DATE OF PUBLICATION IN THE **Federal Register**]; and

(B) Met the requirements of A–15 of 26 CFR 1.401(a)(9)–6, revised April 1, 2021.

(q) *Qualifying longevity annuity contract*—(1) *Definition of qualifying longevity annuity contract.* A qualifying longevity annuity contract (QLAC) is an annuity contract described in paragraph (d) of this section that is purchased from an insurance company for an employee and that, in accordance with the rules of application of paragraph (q)(4) of this section, satisfies each of the following requirements—

(i) Premiums for the contract satisfy the limitations of paragraph (q)(2) of this section;

(ii) The contract provides that distributions under the contract must commence not later than a specified annuity starting date that is no later than the first day of the month next following the 85th anniversary of the employee's birth;

(iii) The contract provides that, after distributions under the contract commence, those distributions must satisfy the requirements of this section (other than the requirement in paragraph (a)(3) of this section that annuity payments commence on or before the required beginning date);

(iv) After the required beginning date, the contract does not make available any commutation benefit, cash surrender right, or other similar feature;

(v) No benefits are provided under the contract after the death of the employee other than the benefits described in paragraph (q)(3) of this section;

(vi) When the contract is issued (or December 31, 2016, if later), the contract (or a rider or endorsement with respect to that contract) states that the contract is intended to be a QLAC; and

(vii) The contract is not a variable contract under section 817, an indexed contract, or a similar contract, except to the extent provided by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(2) *Limitations on premiums*—(i) *In general.* The premiums paid with respect to the contract on a date (premium payment date) satisfy the limitations of this paragraph (q)(2) if they do not exceed the lesser of the dollar limitation in paragraph (q)(2)(ii) of this section or the percentage limitation in paragraph (q)(2)(iii) of this section. For purposes of this paragraph (q)(2)(i), if an insurance contract is exchanged for a contract intended to be a QLAC, the fair market value of the exchanged contract will be treated as a premium paid for the QLAC.

(ii) *Dollar limitation.* The dollar limitation as of a premium payment date is an amount by which $125,000 (as adjusted under paragraph (q)(4)(ii)(A) of this section), exceeds the sum of—

(A) The premiums paid before that date with respect to the contract, and

(B) The premiums paid on or before that date with respect to any other contract that is intended to be a QLAC and that is purchased for the employee under the plan, or any other plan, annuity, or account described in section 401(a), 403(a), 403(b), or 408 or eligible governmental plan under section 457(b).

(iii) *Percentage limitation.* The percentage limitation as of a premium payment date is an amount by which 25 percent of the employee's account balance under the plan (including the value of any QLAC held under the plan for the employee) as of that date, determined in accordance with paragraph (q)(4)(iii) of this section, exceeds the sum of—

(A) The premiums paid before that date with respect to the contract, and

(B) The premiums paid on or before that date with respect to any other contract that is intended to be a QLAC and that is held or was purchased for the employee under the plan.

(3) *Payments after death of the employee*—(i) *Surviving spouse is sole beneficiary*—(A) *Death on or after annuity starting date.* If the employee dies on or after the annuity starting date for the contract and the employee's surviving spouse is the sole beneficiary under the contract then, except as provided in paragraph (q)(3)(iv) of this section, the only benefit permitted to be paid after the employee's death is a life annuity payable to the surviving spouse under which the periodic annuity payment does not exceed 100 percent of the periodic annuity payment that is payable to the employee.

(B) *Death before annuity starting date.* If the employee dies before the annuity starting date and the employee's surviving spouse is the sole beneficiary under the contract then, except as provided in paragraph (q)(3)(iv) of this section, the only benefit permitted to be paid after the employee's death is a life annuity payable to the surviving spouse under which the periodic annuity payment does not exceed 100 percent of the periodic annuity payment that would have been payable to the employee as of the date that benefits to the surviving spouse commence. However, the annuity is permitted to exceed 100 percent of the periodic annuity payment that would have been payable to the employee to the extent necessary to satisfy the requirement to provide a qualified preretirement survivor annuity (as defined under section 417(c)(2) of the Code or section 205(e)(2) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (ERISA), pursuant to section 401(a)(11)(A)(ii) of the Code or section 205(a)(2) of ERISA). Any life annuity payable to the surviving spouse under this paragraph (q)(3)(i)(B) must commence no later than the date on which the annuity payable to the employee would have commenced under the contract if the employee had not died.

(ii) *Surviving spouse is not sole beneficiary*—(A) *Death on or after annuity starting date.* If the employee dies on or after the annuity starting date for the contract and the employee's surviving spouse is not the sole beneficiary under the contract then, except as provided in paragraph (q)(3)(iv) of this section, the only benefit permitted to be paid after the employee's death is a life annuity payable to the designated beneficiary under which the periodic annuity payment does not exceed the applicable percentage (determined under paragraph (q)(3)(iii) of this section) of the periodic annuity payment that is payable to the employee.

(B) *Death before annuity starting date.* If the employee dies before the annuity starting date and the employee's surviving spouse is not the sole beneficiary under the contract then, except as provided in paragraph (q)(3)(iv) of this section, the only benefit permitted to be paid after the employee's death is a life annuity payable to the designated beneficiary under which the periodic annuity payment is not in excess of the applicable percentage (determined under paragraph (q)(3)(iii) of this section) of the periodic annuity payment that would have been payable to the employee as of the date that benefits to the designated beneficiary commence under this paragraph (q)(3)(ii)(B). In any case in which the employee dies before the annuity starting date, any life annuity payable to a designated beneficiary under this paragraph (q)(3)(ii)(B) must commence by the last day of the calendar year following the calendar year of the employee's death.

(A) *Designated beneficiary who is not an eligible designated beneficiary.* Benefits paid to a designated beneficiary under this paragraph (q)(3)(ii) must satisfy the rules of section 401(a)(9)(H) and § 1.401(a)(9)–5(e).

(iii) *Applicable percentage*—(A) *Contracts without pre-annuity starting date death benefits.* If, as described in paragraph (q)(3)(iii)(E) of this section, the contract does not provide for a pre-annuity starting date non-spousal death benefit, the applicable percentage is the percentage described in the table in paragraph (b)(3) of this section.

(B) *Contracts with set beneficiary designation.* If the contract provides for a set non-spousal beneficiary designation as described in paragraph (q)(3)(iii)(F) of this section (and is not a contract described in paragraph (q)(3)(iii)(E) of this section), the applicable percentage is the percentage described in the table set forth in paragraph (q)(3)(iii)(D) of this section.

(C) *Contracts providing for return of premium.* If the contract provides for a return of premium as described in paragraph (q)(3)(v) of this section, the applicable percentage is 0.

(D) *Applicable percentage table.* The applicable percentage is the percentage specified in following table for the adjusted employee/beneficiary age difference, determined in the same manner as in paragraph (b)(2)(iii)(A) of this section.

TABLE 7—APPLICABLE TO PARAGRAPH (q)(3)(iii)(D)

Adjusted employee/ beneficiary age difference	Applicable percentage
2 years or less	100
3	88
4	78
5	70
6	63
7	57
8	52
9	48
10	44
11	41
12	38
13	36
14	34
15	32
16	30
17	28
18	27
19	26
20	25
21	24
22	23
23	22
24	21
25 and greater	20

(E) *No pre-annuity starting date non-spousal death benefit.* A contract is described in this paragraph (q)(3)(iii)(E) if the contract provides that no benefit may be paid to a beneficiary other than the employee's surviving spouse after the employee's death—

(*1*) In any case in which the employee dies before the annuity starting date under the contract; and

(*2*) In any case in which the employee selects an annuity starting date that is earlier than the specified annuity starting date under the contract and the employee dies less than 90 days after making that election.

(F) *Contracts permitting set non-spousal beneficiary designation.* A contract provides for a set non-spousal beneficiary designation as described in this paragraph (q)(3)(iii)(F) if the contract provides that, if the beneficiary under the contract is not the employee's surviving spouse, then benefits are payable to the beneficiary only if the beneficiary was irrevocably designated on or before the later of the date of purchase or the employee's required beginning date. A contract does not fail to be described in the preceding sentence merely because the surviving spouse becomes the sole beneficiary before the annuity starting date. In those circumstances, the requirements of paragraph (q)(3)(i) of this section apply and not the requirements of this paragraph (q)(3)(iii).

(iv) *Calculation of early annuity payments.* For purposes of paragraphs (q)(3)(i)(B) and (q)(3)(ii)(B) of this section, to the extent the contract does not provide an option for the employee to select an annuity starting date that is earlier than the date on which the annuity payable to the employee would have commenced under the contract if the employee had not died, the contract must provide a way to determine the periodic annuity payment that would have been payable if the employee were to have an option to accelerate the payments and the payments had commenced to the employee immediately prior to the date that benefit payments to the surviving spouse or designated beneficiary commence.

(v) *Return of premiums*—(A) *In general.* In lieu of a life annuity payable to a designated beneficiary under paragraph (q)(3)(i) or (ii) of this section, a QLAC may provide for a benefit to be paid to a beneficiary after the death of the employee up to the amount by which the premium payments made with respect to the QLAC exceed the payments already made under the QLAC.

(B) *Payments after death of surviving spouse.* If a QLAC is providing a life annuity to a surviving spouse (or will provide a life annuity to a surviving spouse) under paragraph (q)(3)(i) of this section, it may also provide for a benefit payable to a beneficiary after the death of both the employee and the spouse up to the amount by which the premium payments made with respect to the QLAC exceed the payments already made under the QLAC.

(C) *Timing of return of premium payment and other rules.* A return of premium payment under this paragraph (q)(3)(v) must be paid no later than the end of the calendar year following the calendar year in which the employee dies. If the employee's death is after the required beginning date, the return of premium payment is treated as a required minimum distribution for the year in which it is paid and is not eligible for rollover. If the return of premium payment is paid after the death of a surviving spouse who is receiving a life annuity (or after the death of a surviving spouse who has not yet commenced receiving a life annuity after the death of the employee), the return of premium payment under this paragraph (q)(3)(v) must be made no later than the end of the calendar year following the calendar year in which the surviving spouse dies. If the surviving spouse's death is after the required beginning date for the surviving spouse, then the return of premium payment is treated as a required minimum distribution for the year in which it is paid and is not eligible for rollover.

(vi) *Multiple beneficiaries.* If an employee has more than one designated beneficiary under a QLAC, the rules in § 1.401(a)(9)–8(a) apply for purposes of paragraphs (q)(3)(i) and (ii) of this section.

(4) *Rules of application*—(i) *Rules relating to premiums*—(A) *Reliance on representations.* For purposes of the limitation on premiums described in paragraphs (q)(2)(ii) and (iii) of this section, unless the plan administrator has actual knowledge to the contrary, the plan administrator may rely on an employee's representation (made in writing or such other form as may be prescribed by the Commissioner) of the amount of the premiums described in paragraphs (q)(2)(ii)(B) and (q)(2)(iii)(B) of this section, but only with respect to premiums that are not paid under a plan, annuity, or contract that is maintained by the employer or an entity that is treated as a single employer with the employer under section 414(b), (c), (m), or (o).

(B) *Consequences of excess premiums and correction.* If an annuity contract fails to be a QLAC solely because a premium for the contract exceeds the limits under paragraph (q)(2) of this section, then the contract is not a QLAC beginning on the date on which the premium is paid and the value of the contract may not be disregarded under § 1.401(a)(9)–5(b)(4) as of the date on which the contract ceases to be a QLAC (unless the excess premium is returned to the non-QLAC portion of the employee's account in accordance with the next sentence). However, if the excess premium is returned (either in cash or in the form of a contract that is not intended to be a QLAC) to the non-QLAC portion of the employee's account by the end of the calendar year following the calendar year in which the excess premium was originally paid, then the contract will not be treated as exceeding the limits under paragraph (q)(2) of this section at any time, and the value of the contract will not be included in the employee's account balance under § 1.401(a)(9)–5(b)(4). If the excess premium (including the fair market value of an annuity contract that is not intended to be a QLAC, if applicable) is returned to the non-QLAC portion of the employee's account after the last valuation date for the calendar year in which the excess premium was originally paid, then the employee's account balance for that calendar year must be increased to reflect that excess premium in the same manner as an employee's account balance is increased under § 1.401(a)(9)–7(b) to reflect a rollover received after the last valuation date. If the excess premium is returned to the non-QLAC portion of the employee's account as described in paragraph (q)(4)(ii)(B) of this section, it will not be treated as a violation of the requirement in paragraph (q)(1)(iv) of this section that the contract not provide a commutation benefit.

(C) *Application of 25-percent limit.* For purposes of the 25-percent limit under paragraph (q)(2)(iii) of this section, an employee's account balance on the date on which premiums for a contract are paid is the account balance as of the last valuation date preceding the date of the premium payment, adjusted by—

(*1*) Increasing the account balance for contributions allocated to the account during the period that begins after the valuation date and ends before the date the premium is paid; and

(*2*) Decreasing the account balance for distributions made from the account during that period.

(ii) *Dollar and age limitations subject to adjustments*—(A) *Dollar limitation.* The $125,000 amount under paragraph (q)(2)(ii) of this section will be adjusted at the same time and in the same manner as the limits are adjusted under section 415(d), except that—

(*1*) The base period is the calendar quarter beginning July 1, 2013; and

(*2*) The amount of any increment to the limit that is not a multiple of $10,000 will be rounded to the next lowest multiple of $10,000.

(B) *Age limitation.* The maximum age set forth in paragraph (q)(1)(ii) of this section may be adjusted to reflect changes in mortality, with any adjusted age to be prescribed by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. See § 601.601(d) of this chapter.

(C) *Prospective application of adjustments.* If a contract fails to be a QLAC because it does not satisfy the dollar limitation in paragraph (q)(2)(ii) of this section or the age limitation in paragraph (q)(1)(ii) of this section, any subsequent adjustment that is made pursuant to this paragraph (q)(4)(ii) will not cause the contract to become a QLAC.

(iii) *Determination of whether contract is intended to be a QLAC*—(A) *Structural deficiency.* If a contract fails to be a QLAC at any time for a reason other than an excess premium described in paragraph (q)(4)(i)(B) of this section, then, as of the date of purchase, the contract will not be treated as a QLAC (for purposes of § 1.401(a)(9)–5(c)(4)) or as a contract that is intended to be a QLAC (for purposes of paragraph (q)(2) of this section).

(B) *Roth IRAs.* A contract that is purchased under a Roth IRA is not treated as a contract that is intended to be a QLAC for purposes of applying the dollar and percentage limitation rules in paragraphs (q)(2)(ii) and (q)(2)(iii) of this section. See A–14(d) of § 1.408A–6. If a QLAC is purchased or held under a plan, annuity, account, or traditional IRA, and that contract is later rolled over or converted to a Roth IRA, the contract is not treated as a contract that is intended to be a QLAC after the date of the rollover or conversion. Thus, premiums paid with respect to the contract will not be taken into account under paragraphs (q)(2)(ii) and (q)(2)(iii) of this section after the date of the rollover or conversion.

(iv) *Certain contract features permitted for QLACs*—(A) *Participating annuity contract.* An annuity contract does not fail to satisfy the requirement of paragraph (q)(1)(vii) of this section merely because it provides for the payment of dividends described in paragraph (n)(3)(iii) of this section.

(B) *Contracts with cost-of-living adjustments.* An annuity contract does not fail to satisfy the requirement of paragraph (q)(1)(vii) of this section merely because it provides for a cost-of-living adjustment as described in paragraph (o)(2) of this section.

(v) *Group annuity contract certificates.* The requirement under paragraph (q)(1)(vi) of this section that the contract state that it is intended to be a QLAC when issued is satisfied if a certificate is issued under a group annuity contract and the certificate, when issued, states that the employee's interest under the group annuity contract is intended to be a QLAC.

§ 1.401(a)(9)–7 Rollovers and transfers.

(a) *Treatment of rollover from distributing plan.* If an amount is distributed by a plan, then the amount distributed is still taken into account by the distributing plan for purposes of satisfying the requirements of section 401(a)(9), even if part of the distribution is rolled over into another eligible retirement plan described in section 402(c)(8). However, an amount that is a required minimum distribution under section 401(a)(9) is not eligible to be rolled over (and is therefore includible in the taxpayer's gross income under section 402). For this purpose, the amount that constitutes a required minimum distribution for a calendar year is determined in accordance with § 1.402(c)–2(f) for a distribution to an employee and § 1.402(c)–2(j)(3) for a distribution to a beneficiary.

(b) *Treatment of rollover by receiving plan.* If an amount is distributed by one plan (distributing plan) and is rolled over to another plan (receiving plan), the benefit of the employee under the receiving plan is increased by the amount rolled over for purposes of determining the required minimum distribution for the calendar year following the calendar year in which the amount rolled over was distributed. If the amount rolled over is received after the last valuation date in the calendar year under the receiving plan, the benefit of the employee as of that valuation date, adjusted in accordance with § 1.401(a)(9)–5(b), is increased by the rollover amount valued as of the date of receipt. In addition, if the amount rolled over is received in a different calendar year from the calendar year in which it is distributed, the amount rolled over is deemed to have been received by the receiving plan on the last day of the calendar year in which it was distributed.

(c) *Treatment of transfer under transferor plan*—(1) *Generally not treated as distribution.* In the case of a transfer of an amount of an employee's benefit from one plan (transferor plan) to another plan (transferee plan), the transfer is not treated as a distribution by the transferor plan for purposes of section 401(a)(9). Instead, the benefit of the employee under the transferor plan is decreased by the amount transferred. However, if any portion of an employee's benefit is transferred in a distribution calendar year with respect to that employee, in order to satisfy the requirements of section 401(a)(9), the transferor plan must determine the amount of the required minimum distribution with respect to that employee for the calendar year of the transfer using the employee's benefit under the transferor plan before the transfer. Additionally, if any portion of an employee's benefit is transferred in the employee's second distribution calendar year, but on or before the employee's required beginning date, in order to satisfy section 401(a)(9), the transferor plan must determine the amount of the required minimum distribution for the employee's first distribution calendar year based on the employee's benefit under the transferor plan before the transfer. The transferor plan may satisfy the minimum distribution requirement for the calendar year of the transfer (and the prior year if applicable) by segregating the amount that must be distributed from the employee's benefit and not transferring that amount. That amount may be retained by the transferor plan and must be distributed on or before the date required under section 401(a)(9).

(2) *Account balance decreased after transfer.* For purposes of determining any required minimum distribution for the calendar year following the calendar year in which the transfer occurs, in the case of a transfer after the last valuation date for the calendar year of the transfer under the transferor plan, the benefit of the employee as of that valuation date, adjusted in accordance with § 1.401(a)(9)–5(b), is decreased by the amount transferred, valued as of the date of the transfer.

(d) *Treatment of transfer under transferee plan.* In the case of a transfer from one plan (transferor plan) to another plan (transferee plan), the benefit of the employee under the transferee plan is increased by the amount transferred in the same manner as if it were a plan receiving a rollover contribution under paragraph (b) of this section.

(e) *Treatment of spinoff or merger.* For purposes of determining an employee's benefit and required minimum distribution under section 401(a)(9), a spinoff, a merger, or a consolidation (as defined in § 1.414(l)–1(b)) is treated as a transfer of the benefits of the employees involved. Consequently, the benefit and required minimum distribution with respect to each employee whose benefits are transferred will be determined in accordance with paragraphs (c) and (d) of this section.

§ 1.401(a)(9)–8 Special rules.

(a) *Use of separate accounts*—(1) *Separate application of section 401(a)(9) for beneficiaries*—(i) *In general.* Notwithstanding § 1.401(a)(9)–5(b) and except as otherwise provided in this paragraph (a)(1), after the death of the employee, section 401(a)(9) is applied separately with respect to the separate interests of each of the employee's beneficiaries under the plan provided that the separate accounting requirements of paragraph (a)(2) of this section are satisfied.

(ii) *Separate accounting requirements not timely satisfied.* If the separate accounting requirements of paragraph (a)(2) of this section are not satisfied until after the end of the calendar year following the calendar year of the employee's death, then for distribution calendar years after those requirements are satisfied—

(A) The aggregate required distribution for a distribution calendar year is determined without regard to the separate account rule in paragraph (a)(1)(i) of this section;

(B) The amount of the aggregate required distribution determined in accordance with paragraph (a)(1)(ii)(A) of this section is allocated among the beneficiaries based on each respective beneficiary's share of the total remaining balance of the employee's interest in the plan; and

(C) The allocated share for each beneficiary determined under paragraph (a)(2)(ii)(B) of this section is required to be distributed to that beneficiary.

(iii) *Separate application of section 401(a)(9) for trust beneficiaries*—(A) *General prohibition.* Except as provided in paragraph (a)(1)(iii)(B) of this section, section 401(a)(9) may not be applied separately to the separate interests of each of the beneficiaries of a trust that satisfies the requirements of § 1.401(a)(9)–4(f)(2). Thus, section 401(a)(9) may not be applied separately to each of the beneficiaries of the trust who are taken into account under § 1.401(a)(9)–4(f)(3). In this case, for purposes of the excise tax under section 4974, the trust is the payee with respect to the required distribution of the employee's interest in the plan.

(B) *Special rule for type I applicable multi-beneficiary trust.* Section 401(a)(9) may be applied separately with respect to the separate interests of the beneficiaries reflected in the separate trusts of each beneficiary of a type I applicable multi-beneficiary trust described in § 1.401(a)(9)–4(g)(2), provided that the separate accounting rules of paragraph (a)(2) of this section are satisfied.

(2) *Separate accounting requirements*—(i) *Allocation of post-death distributions required.* A separate accounting must allocate any post-death distribution with respect to a beneficiary's interest to the separate account of the beneficiary receiving that distribution.

(ii) *Allocation of other items.* A separate accounting must allocate all post-death investment gains and losses, contributions, and forfeitures, for the period prior to the establishment of the separate accounts on a pro rata basis in a reasonable and consistent manner among the separate accounts. In lieu of a pro rata allocation of investment gains and losses, a separate accounting may provide for the establishment of separate accounts that have separate investments under which the investment gains and losses attributable to assets held in a separate account are allocated only to that separate account.

(b) *Application of consent requirements.* Section 411(a)(11) and section 417(e) require employee and spousal consent to certain distributions of plan benefits while those benefits are immediately distributable. If an employee's normal retirement age is later than the employee's required beginning date and, therefore, benefits are still immediately distributable (within the meaning of § 1.411(a)–11(c)(4)), distributions must be made to the employee (or, if applicable, to the employee's spouse) in a manner that satisfies the requirements of section 401(a)(9) even though the employee (or, if applicable, the employee's spouse) fails to consent to the distribution. In that case, the benefit may be distributed in the form of a qualified joint and survivor annuity (QJSA) or in the form of a qualified preretirement survivor annuity (QPSA), as applicable, and the consent requirements of sections 411(a)(11) and 417(e) are deemed to be satisfied if the plan has made reasonable efforts to obtain consent from the employee (or, if applicable, the employee's spouse) and if the distribution otherwise meets the requirements of section 417. If the distribution is not required to be in the form of a QJSA to an employee or a QPSA to a surviving spouse, the required minimum distribution amount may be paid to satisfy section 401(a)(9), and the consent requirements of sections 411(a)(11) and 417(e) are deemed to be satisfied if the plan has made reasonable efforts to obtain consent from the employee (or, if applicable, the employee's spouse) and the distribution otherwise meets the requirements of section 417.

(c) *Definition of spouse.* Except as otherwise provided in paragraph (d)(1) of this section (in the case of distributions of a portion of an employee's benefit payable to a former spouse of an employee pursuant to a qualified domestic relations order), for purposes of satisfying the requirements of section 401(a)(9), an individual is the spouse or surviving spouse of an employee if the marriage of the employee and individual is recognized for federal tax purposes under the rules of § 301.7701–18. In the case of distributions after the death of an employee, for purposes of section 401(a)(9), the spouse of the employee is determined as of the date of death of the employee.

(d) *Treatment of QDROs*—(1) *Continued treatment of spouse.* A former spouse to whom all or a portion of the employee's benefit is payable pursuant to a qualified domestic relations order described in section 414(p) (QDRO) is treated as a spouse (including a surviving spouse) of the employee for purposes of satisfying the requirements of section 401(a)(9), including the minimum distribution incidental benefit requirement under section 401(a)(9)(G), regardless of whether the QDRO specifically provides that the former spouse is treated as the spouse for purposes of sections 401(a)(11) and 417.

(2) *Separate accounts*—(i) *In general*—(A) *Separate accounts while the employee is alive.* If a QDRO provides that an employee's benefit is to be divided and a portion is to be allocated to an alternate payee, that portion will be treated as a separate account (or segregated share) which separately must satisfy the requirements of section 401(a)(9) and may not be aggregated with other separate accounts (or segregated shares) of the employee for purposes of satisfying section 401(a)(9). Except as otherwise provided in paragraph (f)(2)(ii) of this section, distribution of a separate account allocated to an alternate payee pursuant to a QDRO must be made in accordance with section 401(a)(9). For example, distributions of the separate account will satisfy section 401(a)(9)(A) if required minimum distributions from the separate account during the employee's lifetime begin no later than the employee's required beginning date and the required minimum distribution is determined in accordance with § 1.401(a)(9)–5 for each distribution calendar year using an applicable denominator determined under § 1.401(a)(9)–5(c) (determined by treating the spousal alternate payee as the employee's spouse).

(B) *Separate accounts after the death of the employee.* The determination of whether distributions from the separate account after the death of the employee to the alternate payee will be made in accordance with section 401(a)(9)(B)(i) or in accordance with section 401(a)(9)(B)(ii) or (iii) and (iv) will depend on whether distributions have begun as determined under § 1.401(a)(9)–2(a) (which provides, in general, that distributions are not treated as having begun until the employee's required beginning date even though payments may actually have begun before that date). For example, if the alternate payee dies before the employee, and if distributions of the separate account allocated to the alternate payee pursuant to the QDRO are to be made to the alternate payee's beneficiary, then that beneficiary may be treated as a designated beneficiary for purposes of determining the required minimum distribution from the separate account after the death of the employee provided that the beneficiary of the alternate payee is an individual who is a beneficiary under the plan or specified to or in the plan. Specification in or pursuant to the QDRO is treated as specification to the plan.

(ii) *Satisfaction of section 401(a)(9) requirements.* Distribution of the separate account allocated to an alternate payee pursuant to a QDRO satisfies the requirements of section 401(a)(9)(A)(ii) if the separate account is distributed, beginning no later than the employee's required beginning date, over the life of the alternate payee (or over a period not extending beyond the life expectancy of the alternate payee). Also if, pursuant to § 1.401(a)(9)–3(b)(4)(iii) or (c)(5)(iii), the plan permits the employee to elect the distribution method that will apply upon the death of the employee, that election is to be made only by the alternate payee for purposes of distributing the alternate payee's separate account. If the alternate payee dies after distribution of the alternate payee's separate account has begun (determined under § 1.401(a)(9)–2(a)(3)) but before the employee dies, distribution of the remaining portion of that portion of the benefit allocated to the alternate payee must be made in accordance with the rules in § 1.401(a)(9)–5(c) or § 1.401(a)(9)–6(a) for distributions during the life of the employee. Only after the death of the employee is the amount of the required minimum distribution determined in accordance with the rules in § 1.401(a)(9)–5(d) or § 1.401(a)(9)–6(b).

(3) *Other situations.* If a QDRO does not provide that an employee's benefit is to be divided but provides that a portion of an employee's benefit (otherwise payable to the employee) is to be paid to an alternate payee, that portion is not treated as a separate account (or segregated share) of the employee. Instead, that portion is aggregated with any amount distributed to the employee and treated as having been distributed to the employee for purposes of determining whether section 401(a)(9) has been satisfied with respect to that employee.

(e) *Application of section 401(a)(9) pending determination of whether a domestic relations order is a QDRO is being made.* A plan does not fail to satisfy the requirements of section 401(a)(9) merely because it fails to distribute an amount otherwise required to be distributed by section 401(a)(9) during the period in which the issue of whether a domestic relations order is a QDRO is being determined pursuant to section 414(p)(7), provided that the period does not extend beyond the 18-month period described in section 414(p)(7)(E). To the extent that a distribution otherwise required under section 401(a)(9) is not made during this period, any segregated amounts, as defined in section 414(p)(7)(A), are treated as though the amounts are not vested during the period and any distributions with respect to those amounts must be made under the relevant rules for nonvested benefits described in either § 1.401(a)(9)–5(g) or § 1.401(a)(9)–6(f), as applicable.

(f) *Application of section 401(a)(9) when insurer is in state delinquency proceedings.* A plan does not fail to satisfy the requirements of section 401(a)(9) merely because an individual's distribution from the plan is less than the amount otherwise required to satisfy section 401(a)(9) because distributions were being paid under an annuity contract issued by a life insurance company in state insurer delinquency proceedings and have been reduced or suspended by reason of those state proceedings. To the extent that a distribution otherwise required under section 401(a)(9) is not made during the state insurer delinquency proceedings, that amount and any additional amount accrued during that period are treated as though those amounts are not vested during that period and any distributions with respect to those amounts must be made under the relevant rules for nonvested benefits described in either § 1.401(a)(9)–5(g) or § 1.401(a)(9)–6(f), as applicable.

(g) *In-service distributions required to satisfy section 401(a)(9).* A plan does not fail to qualify as a pension plan within the meaning of section 401(a) solely because the plan permits distributions to commence to an employee on or after the employee's required beginning date (as determined in accordance with § 1.401(a)(9)–2(b)) even though the employee has not retired or attained the normal retirement age under the plan as of the date on which the distributions commence. This rule applies without regard to whether the employee is a 5-percent owner with respect to the plan year ending in the calendar year in which distributions commence.

(h) *TEFRA section 242(b) elections*—(1) *In general.* Even though the distribution requirements added by the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97–248, 96 Stat. 324 (1982) (TEFRA), were retroactively repealed in 1984, the transitional election rule in section 242(b) of TEFRA (referred to as a section 242(b)(2) election in this paragraph (h)) was preserved. While sections 401(a)(11) and 417 must be satisfied with respect to any distribution subject to those requirements, satisfaction of those requirements is not considered a revocation of the section 242(b) election.

(2) *Application of section 242(b) election after transfer*—(i) *Section 242(b)(2) election made under transferor plan.* If an amount is transferred from one plan (transferor plan) to another plan (transferee plan), the amount transferred may be distributed in accordance with a section 242(b)(2) election made under the transferor plan if the employee did not elect to have the amount transferred and if the transferee plan separately accounts for the amount transferred. However, only the benefit attributable to the amount transferred, plus earnings thereon, may be distributed in accordance with the section 242(b)(2) election made under the transferor plan. If the employee elected to have the amount transferred or the transferee plan does not separately account for the amount transferred, the transfer is treated as a distribution and rollover of the amount transferred for purposes of this section.

(ii) *Section 242(b)(2) election made under transferee plan.* If an amount is transferred from one plan to another plan, the amount transferred may not be distributed in accordance with a section 242(b)(2) election made under the transferee plan. If a section 242(b)(2) election was made under the transferee plan, the transferee plan must separately account for the amount transferred. If the transferee plan does not separately account for the amount transferred, the section 242(b)(2) election under the transferee plan is revoked, and subsequent distributions by the transferee plan must satisfy section 401(a)(9).

(iii) *Spinoff, merger, or consolidation treated as transfer.* A spinoff, merger, or consolidation, as defined in § 1.414(l)–1(b), is treated as a transfer for purposes of the section 242(b)(2) election.

(3) *Application of section 242(b) election after rollover.* If an amount is distributed from one plan (distributing plan) and rolled over into another plan (receiving plan), the amount rolled over must be distributed from the receiving plan in accordance with section 401(a)(9) whether or not the employee made a section 242(b)(2) election under the distributing plan. Further, if the amount rolled over was not distributed in accordance with the election, the election under the distributing plan is revoked and all subsequent distributions by the distributing plan must satisfy section 401(a)(9). Finally, if the employee made a section 242(b)(2) election under the receiving plan and the election is still in effect, the receiving plan must separately account for the amount rolled over and distribute that amount in accordance with section 401(a)(9). If the receiving plan does not separately account for the amounts rolled over, any section 242(b)(2) election under the receiving plan is revoked and subsequent distributions under the receiving plan must satisfy section 401(a)(9).

(4) *Revocation of section 242(b) election*—(i) *In general.* A section 242(b)(2) election may be revoked after the required beginning date under section 401(a)(9)(C). However, if the section 242(b)(2) election is revoked after the required beginning date, and the total amount of the distributions that would have been required prior to the date of the revocation in order to satisfy section 401(a)(9), but for the section 242(b)(2) election, have not been made, then—

(A) The catch-up distribution described in paragraph (h)(4)(ii) of this section must be made by the end of the calendar year following the calendar year in which the revocation occurs; and

(B) Distributions must continue in accordance with section 401(a)(9).

(ii) *Catch-up distribution.* The catch-up distribution must be equal to the total amount not yet distributed that would have been required to be distributed to satisfy the requirements of section 401(a)(9).

■ **Par. 3.** Section 1.401(a)(9)–9 is amended as follows:

■ 1. In the title, remove the phrase ''distribution period'' and add in its place the phrase ''uniform lifetime''.

■ 2. In paragraph (a), remove the phrase ''applicable distribution period'' and add in its place the phrase ''uniform lifetime''.

■ 3. In paragraph (c), remove the phrase ''distribution period'' and add in its place the phrase ''applicable denominator''.

■ 4. In the heading of the second column of Table 2 to paragraph (c), remove the phrase ''Distribution period'' and add in its place the phrase ''Applicable denominator''.

■ 5. In paragraph (f)(2)(i), remove the phrase ''distribution period that applies'' and add in its place the phrase ''applicable denominator''.

■ 6. In paragraph (f)(2)(i), remove the phrase ''applicable distribution period'' and add in its place the phrase ''applicable denominator''.

■ 7. In the heading of paragraph (f)(2)(ii), remove the phrase ''distribution period'' and add in its place the word ''denominator''.

■ 8. In the heading of paragraph (f)(2)(ii)(A), remove the phrase ''Distribution period'' and add in its place the phrase ''Applicable denominator''.

■ 9. In paragraph (f)(2)(ii)(A), remove the phrase ''distribution period that applies'' and add in its place the phrase ''applicable denominator''.

■ 10. In paragraph (f)(2)(ii)(A), remove the phrase ''resulting distribution period'' and add in its place the phrase ''resulting applicable denominator''.

■ 11. In paragraph (f)(2)(ii)(A), remove the last sentence.

■ 12. In paragraph (f)(2)(ii)(B), remove the phrase ''distribution period that would have applied'' and add in its place the phrase ''denominator that would have applied''.

■ 13. In paragraph (f)(2)(ii)(B), remove the phrase ''period applicable'' and add in its place the phrase ''life expectancy''.

■ 14. In paragraph (f)(2)(ii)(B), remove the phrase ''(the original distribution period, reduced by 1 year)'' and add in its place the phrase ''(the original life expectancy, reduced by 1 year)''.

■ 15. In paragraph (f)(2)(ii)(B), remove the phrase ''applicable distribution period'' and add in its place the phrase ''applicable denominator''.

■ 16. In paragraph (f)(2)(ii)(B), remove the last sentence.

■ **Par. 4.** Revise § 1.402(c)–2 to read as follows:

§ 1.402(c)–2 Eligible rollover distributions.

(a) *Overview of rollover and related statutory provisions*—(1) *General rule*—(i) *Rollover of distribution paid to employee.* Under section 402(c), any portion of a distribution paid to an employee from a qualified plan that is an eligible rollover distribution described in section 402(c)(4) may be rolled over to an eligible retirement plan described in section 402(c)(8)(B). See paragraph (j) of this section for rules relating to distributions paid to a surviving spouse or a non-spousal beneficiary.

(ii) *Exclusion from income.* Except as otherwise provided in this section, if an eligible rollover distribution is paid to an employee, then the amount distributed is not currently includible in gross income, provided that it is contributed to an eligible retirement plan no later than the 60th day following the day on which the employee received the distribution. However, if all or any portion of an amount equal to the amount withheld is not contributed as a rollover, it is included in the employee's gross income to the extent required under section 402(a), and also may be subject to the 10-percent additional income tax under section 72(t).

(iii) *Definition of eligible retirement plan*—(A) *In general.* An eligible retirement plan means an IRA described in paragraph (a)(1)(iii)(B)(*1*) of this section or a qualified plan described in paragraph (a)(1)(iii)(B)(*2*) of this section. In addition, an eligible deferred compensation plan described in section 457(b) that is maintained by an employer described in section 457(e)(1)(A) is treated as an eligible retirement plan, but only if the plan separately accounts for the amount of the rollover.

(B) *Definitions of IRA and qualified plan.* For purposes of section 402(c) and this section—

(*1*) An IRA is an individual retirement account described in section 408(a) or an individual retirement annuity (other than an endowment contract) described in section 408(b); and

(*2*) A qualified plan is an employees' trust described in section 401(a) that is exempt from tax under section 501(a), an annuity plan described in section 403(a), or an annuity contract described in section 403(b).

(iv) *Multiple distributions.* If more than one distribution is received by an employee from a qualified plan during a taxable year, the 60-day deadline applies separately to each distribution. Because the amount withheld as income tax under section 3405(c) is considered an amount distributed under section 402(c), an amount equal to all or any portion of the amount withheld may be contributed as a rollover to an eligible retirement plan within the 60-day period in addition to the net amount of the eligible rollover distribution actually received by the employee.

(v) *Definition of rollover.* For purposes of section 402(c) and this section, a rollover is—

(A) A direct rollover as described in § 1.401(a)(31)–1, Q&A–3;

(B) A contribution of an eligible rollover distribution to an eligible retirement plan that, except as provided in paragraph (b)(2) of this section, satisfies the time period requirement in paragraph (a)(1)(ii) of this section and the designation requirement described in paragraph (k)(1) of this section; or

(C) A repayment of a distribution that is treated as a rollover, as described in paragraph (a)(1)(vi) of this section.

(vi) *Certain repayments treated as rollovers.* The repayment of a distribution is treated as a rollover if that treatment is prescribed under another statutory provision. For example, the repayment of a qualified disaster distribution under section 302 of Division EE of the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182 (2020) is treated as a rollover for purposes of this section.

(2) *Related Internal Revenue Code provisions*—(i) *Direct rollover option.* Section 401(a)(31) requires qualified plans to provide a distributee of an eligible rollover distribution the option to elect to have the distribution paid directly to an eligible retirement plan in a direct rollover. See § 1.401(a)(31)–1 for further guidance concerning this direct rollover option.

(ii) *Notice requirement.* Section 402(f) requires the plan administrator of a qualified plan to provide, within a reasonable time before making an eligible rollover distribution, a written explanation to the distributee of the distributee's right to elect a direct rollover and the withholding consequences of not making that election. The explanation also is required to provide certain other relevant information relating to the taxation of distributions. See § 1.402(f)–1 for guidance concerning the written explanation required under section 402(f).

(iii) *Mandatory income tax withholding.* If a distributee of an eligible rollover distribution does not elect to have the eligible rollover distribution paid directly from the plan to an eligible retirement plan in a direct rollover under section 401(a)(31), the eligible rollover distribution is subject to mandatory income tax withholding under section 3405(c). See § 31.3405(c)–1 of this chapter for provisions relating to the withholding requirements applicable to eligible rollover distributions.

(iv) *Section 403(b) annuities.* See § 1.403(b)–7(b) for guidance concerning the direct rollover requirements for distributions from annuities described in section 403(b).

(3) *Applicability date*—(i) *In general.* The rules provided in this section apply to any distribution made on or after January 1, 2022.

(ii) *Distributions prior to January 1, 2022.* For any distribution made before January 1, 2022, the rules of 26 CFR 1.402(c)–2 and 26 CFR 1.402(c)–3 (as they appeared in the April 1, 2021 edition of 26 CFR part 1) apply. Alternatively, the rules provided in this section may be applied to those distributions.

(b) *Special rules*—(1) *Rules related to Roth accounts*—(i) *Treatment of Roth conversions.* If all or any portion of an eligible rollover distribution that is rolled over to a Roth IRA is not from a designated Roth account described in section 402A, then the amount rolled over to the Roth IRA is included in the employee's gross income to the extent required under section 402(a) (but generally is not subject to the 10-percent additional income tax under section 72(t)).

(ii) *Treatment of distributions from designated Roth accounts.* A distribution from a designated Roth account may be rolled over only to another designated Roth account or to a Roth IRA. See § 1.402A–1, Q&A–5 for rules that apply to such a rollover.

(2) *Extensions of and exceptions to 60-day deadline*—(i) *Waiver of 60-day deadline.* The Commissioner may waive the 60-day deadline described in paragraph (a)(1)(ii) of this section if the failure to waive that requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual with respect to such requirement. See section 402(c)(3)(B).

(ii) *Frozen deposits.* The 60-day period described in paragraph (a)(1)(ii) of this section does not include any period during which the amount transferred to the employee is a frozen deposit described in section 402(c)(7)(B). The 60-day period also does not end earlier than 10 days after that amount ceases to be a frozen deposit.

(iii) *Exception for qualified plan loan offsets.* See paragraph (g) of this section for the timing requirements related to the rollover of a qualified plan loan offset amount.

(iv) *Other distributions treated as rollovers.* In the case of a repayment of a distribution treated as a rollover as described in paragraph (a)(1)(vi) of this section, see the applicable statutory provision and accompanying regulations, if any, for the timing requirements relating to the repayment.

(3) *Special rules for distribution that includes basis*—(i) *Rollover of basis to IRA.* If an eligible rollover distribution includes some or all of an employee's basis (that is, the employee's investment in the contract), then the portion of the distribution that is allocable to the employee's basis may be rolled over to an IRA.

(ii) *Rollover of basis to qualified trust must be done through direct trustee-to-trustee transfer.* If an eligible rollover distribution includes some or all of an employee's basis, then the portion of an eligible rollover distribution that is allocable to the employee's basis may be rolled over to a qualified plan only through a direct trustee-to-trustee transfer. In that case, the qualified trust or annuity contract must provide for separate accounting of the amount transferred (and earnings on that amount) including separately accounting for the portion of the distribution that includes an employee's basis and the portion of the distribution that does not include basis.

(iii) *Rollover of basis to section 457(b) plans not permitted.* The portion of an eligible rollover distribution that is allocable to an employee's basis may not be rolled over to an eligible deferred compensation plan described in section 457(b).

(iv) *Rollover of portion of distribution.* If an eligible rollover distribution includes some or all of an employee's basis and less than the entire distribution is being rolled over, then the amount rolled over is treated as consisting first of the portion of the distribution that is not allocable to the employee's basis.

(4) *Special rules for distributions that include property*—(i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, if an eligible rollover distribution consists of property other than money, then, only that property may be rolled over to an eligible retirement plan.

(ii) *Rollover of proceeds permitted.* In the case of an eligible rollover distribution that consists of property other than money, the proceeds of the sale of that property may be rolled over to an eligible retirement plan. However, to the extent those proceeds exceed the property's fair market value at the time of the sale, that excess may not be rolled over. See section 402(c)(6)(C) and (D) for other rules relating to the sale of distributed property.

(c) *Definition of eligible rollover distribution*—(1) *General rule.* Unless specifically excluded, an eligible rollover distribution means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified plan. Thus, except as specifically provided in paragraph (c)(2) or (3) of this section, any amount distributed to an employee from a qualified plan is an eligible rollover distribution, regardless of whether it is a distribution of a benefit that is protected under section 411(d)(6).

(2) *Exceptions.* An eligible rollover distribution does not include the following:

(i) Any distribution that is one of a series of substantially equal periodic payments made (not less frequently than annually) over any one of the following periods—

(A) The life of the employee (or the joint lives of the employee and the employee's designated beneficiary);

(B) The life expectancy of the employee (or the joint life and last survivor expectancy of the employee and the employee's designated beneficiary); or

(C) A specified period of ten years or more;

(ii) Any distribution to the extent the distribution is a required minimum distribution under section 401(a)(9); or

(iii) Any distribution which is made on account of hardship.

(3) *Other amounts not treated as eligible rollover distributions.* The following amounts are not treated as eligible rollover distributions:

(i) Elective deferrals (as defined in section 402(g)(3)) and employee contributions that, pursuant to rules prescribed by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter), are returned to the employee (together with the income allocable thereto) in order to comply with the section 415 limitations;

(ii) Corrective distributions of excess deferrals as described in § 1.402(g)–1(e)(3), together with the income allocable to these corrective distributions;

(iii) Corrective distributions of excess contributions under a qualified cash or deferred arrangement described in § 1.401(k)–2(b)(2) and excess aggregate contributions described in § 1.401(m)–2(b)(2), together with the income allocable to these distributions;

(iv) Loans that are treated as deemed distributions pursuant to section 72(p);

(v) Subject to the rules of paragraph (c)(4) of this section, dividends paid on employer securities as described in section 404(k);

(vi) The costs of life insurance coverage includible in the employee's income under section 72(m)(3)(B);

(vii) Prohibited allocations that are treated as deemed distributions pursuant to section 409(p);

(viii) Distributions that are permissible withdrawals from an eligible automatic contribution arrangement within the meaning of section 414(w);

(ix) Distributions of premiums for accident or health insurance under § 1.402(a)–1(e)(1)(i);

(x) Deemed distributions with respect to collectibles pursuant to section 408(m); and

(xi) Similar items designated by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d) of this chapter.

(4) *Dividends reinvested in employer securities.* Dividends paid to an employee stock ownership plan (as defined in section 4975(e)(7)) that are reinvested in employer securities pursuant to a participant election under section 404(k)(2)(A)(iii)(II) are included in the participant's account balance and lose their character as dividends when subsequently distributed from the account. As a result, these amounts are eligible rollover distributions if they otherwise meet the requirements of this paragraph (c).

(d) *Determination of substantially equal periodic payments*—(1) *General rule.* For purposes of paragraph (c)(2)(i) of this section, and except as provided in this paragraph (d) or paragraph (e) of this section, whether a series of payments is a series of substantially equal periodic payments over a specified period is determined at the time payments begin, and by following the principles of section 72(t)(2)(A)(iv), without regard to contingencies or modifications that have not yet occurred. Thus, for example, a joint and 50-percent survivor annuity will be treated as a series of substantially equal payments at the time payments commence, as will a joint and survivor annuity that provides for increased payments to the employee if the employee's beneficiary dies before the employee. Similarly, for purposes of determining if a disability benefit payment is part of a series of substantially equal payments for a period described in section 402(c)(4)(A), any contingency under which payments cease upon recovery from the disability may be disregarded.

(2) *Certain supplements disregarded.* For purposes of determining whether a distribution is one of a series of payments that are substantially equal, social security supplements described in section 411(a)(9) are disregarded. For example, if a distributee receives a life annuity of $500 per month, plus a social security supplement consisting of payments of $200 per month until the distributee reaches the age at which social security benefits of not less than $200 a month begin, the $200 supplemental payments are disregarded and, therefore, each monthly payment of $700 made before the social security age and each monthly payment of $500 made after the social security age is treated as one of a series of substantially equal periodic payments for life. A series of payments that are not substantially equal solely because the amount of each payment is reduced upon attainment of social security retirement age (or, alternatively, upon commencement of social security early retirement, survivor, or disability benefits) is also treated as substantially equal as long as the reduction in the actual payments is level and does not exceed the applicable social security benefit.

(3) *Changes in the amount of payments or the distributee.* If the amount (or, if applicable, the method of calculating the amount) of the payments changes so that subsequent payments are not substantially equal to prior payments, then a new determination must be made as to whether the remaining payments are a series of substantially equal periodic payments over a period specified in paragraph (c)(2)(i) of this section. This determination is made without taking into account payments made or the years of payment that elapsed prior to the change. However, a new determination is not made merely because, upon the death of the employee, the employee's beneficiary becomes the distributee. Thus, if distributions commence over a period that is at least as long as either the first annuitant's life or 10 years, then substantially equal payments to the survivor are not eligible rollover distributions even though the payment period remaining after the death of the employee is or may be less than the period described in section 402(c)(4)(A). For example, substantially equal periodic payments made under a life annuity with a five-year term certain would not be an eligible rollover distribution even when paid after the death of the employee with three years remaining under the term certain.

(4) *Defined contribution plans.* The following rules apply in determining whether a series of payments from a defined contribution plan constitutes a series of substantially equal periodic

payments for a period described in section 402(c)(4)(A)—

(i) *Declining balance of years.* A series of payments from an account balance under a defined contribution plan over a period is considered a series of substantially equal periodic payments over that period if, for each year, the amount of the distribution is calculated by dividing the account balance by the number of years remaining in the period. For example, a series of payments is considered substantially equal payments over 10 years if the series is determined as follows. In year 1, the annual payment is the account balance divided by 10; in year 2, the annual payment is the remaining account balance divided by 9; and so on until year 10 when the entire remaining balance is distributed.

(ii) *Reasonable actuarial assumptions.* If an employee's account balance under a defined contribution plan is to be distributed in annual installments of a specified amount until the account balance is exhausted, then, for purposes of determining if the period of distribution is a period described in section 402(c)(4)(A), the period of years over which the installments will be distributed must be determined using reasonable actuarial assumptions. For example, if an employee has an account balance of $100,000, the employee elects distributions of $12,000 per year until the account balance is exhausted, and the future rate of return is assumed to be 5% per year, the account balance will be exhausted in approximately 12 years. Similarly, if the same employee elects a fixed annual distribution amount and the fixed annual amount is less than or equal to $10,000, it is reasonable to assume that the future rate of return will be greater than 0% and, thus, the account will not be exhausted in less than 10 years.

(e) *Determination of whether a payment is an independent payment*—(1) *Definition of independent payments.* Except as provided in paragraph (e)(2) and (3) of this section, a payment is treated as independent of the payments in a series of substantially equal payments, and thus not part of the series described in paragraph (c)(2)(i) of this section, if the payment is substantially larger or smaller than the other payments in the series. An independent payment is an eligible rollover distribution if it is not otherwise excepted from the definition of eligible rollover distribution. This rule applies regardless of whether the payment is made before, with, or after payments in the series. For example, if an employee elects a single payment of half of the account balance with the remainder of the account balance paid over the life expectancy of the distributee, the single payment is treated as independent of the payments in the series and is an eligible rollover distribution unless otherwise excepted. Similarly, if an employee's surviving spouse receives a survivor life annuity of $1,000 per month plus a single payment on account of death of $7,500, the single payment is treated as independent of the payments in the annuity and is an eligible rollover distribution unless otherwise excepted.

(2) *Special rules*—(i) *Administrative error or delay.* If, due solely to reasonable administrative error or delay in payment, there is an adjustment after the annuity starting date to the amount of any payment in a series of payments that otherwise would constitute a series of substantially equal payments described in section 402(c)(4)(A) and this section, the adjusted payment or payments are treated as part of the series of substantially equal periodic payments and are not treated as independent of the payments in the series. For example, if, due solely to reasonable administrative delay, the first payment of a life annuity is delayed by two months and reflects an additional two months' worth of benefits, that payment is treated as a substantially equal payment in the series rather than as an independent payment. The result does not change merely because the amount of the adjustment is paid in a separate supplemental payment.

(ii) *Supplemental payments for annuitants.* A supplemental payment from a defined benefit plan to an annuitant (that is, a retiree or beneficiary) is treated as part of a series of substantially equal payments, rather than as an independent payment, provided that the following conditions are met—

(A) The supplement is a benefit increase for annuitants;

(B) The amount of the supplement is determined in a consistent manner for all similarly situated annuitants;

(C) The supplement is paid to annuitants who are otherwise receiving payments that would constitute substantially equal periodic payments; and

(D) The aggregate supplement is less than or equal to the greater of 10% of the annual rate of payment for the annuity, or $750.

(iii) *Final payment in a series.* If a payment in a series of payments from an account balance under a defined contribution plan represents the remaining balance in the account and is substantially less than the other payments in the series, the final payment must nevertheless be treated as a payment in the series of substantially equal payments and may not be treated as an independent payment if the other payments in the series are substantially equal and the payments are for a period described in section 402(c)(4)(A) based on the rules provided in paragraph (d)(4)(ii) of this section. Thus, the final payment will not be an eligible rollover distribution.

(3) *Additional guidance.* The Commissioner, in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin, may provide additional rules for determining what is an independent payment under paragraph (e)(1) of this section and may prescribe a higher amount than the $750 amount in paragraph (e)(2)(ii)(D) of this section. See § 601.601(d) of this chapter.

(f) *Determination of whether a distribution is a required minimum distribution*—(1) *Determination for calendar year of distribution.* Except as provided in paragraphs (f)(2) and (3) of this section, if a minimum distribution is required for a calendar year, then the amounts distributed during that calendar year are treated as required minimum distributions under section 401(a)(9) to the extent that the total minimum distribution required under section 401(a)(9) for the calendar year has not been satisfied (and accordingly, those amounts are not eligible rollover distributions). For example, if an employee is required under section 401(a)(9) to receive a minimum distribution for a calendar year of $5,000 and the employee receives a total of $7,200 in that year, the first $5,000 distributed will be treated as the required minimum distribution and will not be an eligible rollover distribution, and the remaining $2,200 will be an eligible rollover distribution if it otherwise qualifies. If the total section 401(a)(9) required minimum distribution for a calendar year prior to the calendar year of the distribution is not distributed in that calendar year (for example, when the distribution for the calendar year in which the employee reaches age 72 is made on April 1 of the following calendar year), then, the amount that was required to be distributed, but not distributed, is added to the amount required to be distributed for the next calendar year in determining the portion of any distribution in the next calendar year that is a required minimum distribution.

(2) *Distribution before first distribution calendar year.* Any amount that is paid to an employee before January 1 of the first distribution calendar year (as described in § 1.401(a)(9)–5(a)(2)(ii)) is not treated as

required under section 401(a)(9) and, thus, is an eligible rollover distribution if it otherwise qualifies.

(3) *Special rule for annuities.* In the case of annuity payments from a defined benefit plan, or under an annuity contract purchased from an insurance company (including a qualified plan distributed annuity contract (as defined in paragraph (h) of this section)), the entire amount of any annuity payment made on or after January 1 of the first distribution calendar year (as described in § 1.401(a)(9)–5(a)(2)(ii)) is treated as an amount required under section 401(a)(9) and, thus, is not an eligible rollover distribution.

(g) *Treatment of plan loan offset amounts*—(1) *General rule.* A distribution of a plan loan offset amount, as defined in paragraph (g)(3)(i) of this section (including a qualified plan loan offset amount, a type of plan loan offset amount defined in paragraph (g)(3)(ii) of this section), is an eligible rollover distribution if it is described in paragraph (c) of this section. See § 1.401(a)(31)–1, Q&A–16, for guidance concerning the offering of a direct rollover of a plan loan offset amount. See also § 31.3405(c)–1, Q&A–11, of this chapter for guidance concerning special withholding rules with respect to plan loan offset amounts.

(2) *Rollover period for a plan loan offset amount*—(i) *Plan loan offset amount that is not a qualified plan loan offset amount.* A distribution of a plan loan offset amount that is an eligible rollover distribution and that is not a qualified plan loan offset amount may be rolled over by the employee to an eligible retirement plan within the 60-day period set forth in section 402(c)(3)(A).

(ii) *Plan loan offset amount that is a qualified plan loan offset amount.* A distribution of a plan loan offset amount that is an eligible rollover distribution and that is a qualified plan loan offset amount may be rolled over by the employee to an eligible retirement plan within the period set forth in section 402(c)(3)(C), which is the individual's tax filing due date (including extensions) for the taxable year in which the offset is treated as distributed from a qualified employer plan.

(3) *Definitions*—(i) *Plan loan offset amount.* For purposes of section 402(c), a plan loan offset amount is the amount by which, under the plan terms governing a plan loan, an employee's accrued benefit is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in an employee's accrued benefit). A distribution of a plan loan offset amount can occur in a variety of circumstances, for example, when the terms governing a plan loan require that, in the event of the employee's termination of employment or request for a distribution, the loan be repaid immediately or treated as in default. A distribution of a plan loan offset amount also occurs when, under the terms governing the plan loan, the loan is cancelled, accelerated, or treated as if it were in default (for example, when the plan treats a loan as in default upon an employee's termination of employment or within a specified period thereafter). A distribution of a plan loan offset amount is an actual distribution, not a deemed distribution under section 72(p).

(ii) *Qualified plan loan offset amount.* For purposes of section 402(c), a qualified plan loan offset amount is a plan loan offset amount that satisfies the following requirements:

(A) The plan loan offset amount is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of the termination of the qualified employer plan, or the failure to meet the repayment terms of the loan because of the severance from employment of the employee; and

(B) The plan loan offset amount relates to a plan loan that met the requirements of section 72(p)(2) immediately prior to the termination of the qualified employer plan or the severance from employment of the employee, as applicable.

(iii) *Qualified employer plan.* For purposes of section 402(c) and this section, a qualified employer plan is a qualified employer plan as defined in section 72(p)(4).

(4) *Special rules for qualified plan loan offset amounts*—(i) *Definition of severance from employment.* For purposes of paragraph (g)(3)(ii)(A) of this section, whether an employee has a severance from employment with the employer that maintains the qualified employer plan is determined in the same manner as under § 1.401(k)–1(d)(2). Thus, an employee has a severance from employment when the employee ceases to be an employee of the employer maintaining the plan.

(ii) *Offset because of severance from employment.* A plan loan offset amount is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of the failure to meet the repayment terms of a plan loan because of severance from employment of the employee if the plan loan offset:

(A) Relates to a failure to meet the repayment terms of the plan loan, and

(B) Occurs within the period beginning on the date of the employee's severance from employment and ending on the first anniversary of that date.

(5) *Examples.* The following examples illustrate the rules with respect to plan loan offset amounts, including qualified plan loan offset amounts, in this paragraph (g) and in §§ 1.401(a)(31)–1, Q&A–16, and 31.3405(c)–1, Q&A–11, of this chapter. For purposes of these examples, each reference to a plan refers to a qualified employer plan as described in section 72(p)(4).

(i) *Example 1*—(A) In 2020, Employee A has an account balance of $10,000 in Plan Y, of which $3,000 is invested in a plan loan to Employee A that is secured by Employee A's account balance in Plan Y. Employee A has made no after-tax employee contributions to Plan Y. The plan loan meets the requirements of section 72(p)(2). Plan Y does not provide any direct rollover option with respect to plan loans. Employee A severs from employment on June 15, 2020. After severance from employment, Plan Y accelerates the plan loan and provides Employee A 90 days to repay the remaining balance of the plan loan. Employee A, who is under the age set forth in section 401(a)(9)(C)(i)(I), does not repay the loan within the 90 days and instead elects a direct rollover of Employee A's entire account balance in Plan Y. On September 18, 2020 (within the 12-month period beginning on the date that Employee A severed from employment), Employee A's outstanding loan is offset against the account balance.

(B) In order to satisfy section 401(a)(31), Plan Y must make a direct rollover by paying $7,000 directly to the eligible retirement plan chosen by Employee A. When Employee A's account balance was offset by the amount of the $3,000 unpaid loan balance, Employee A received a plan loan offset amount (equivalent to $3,000) that is an eligible rollover distribution. However, under § 1.401(a)(31)–1, Q&A–16, Plan Y satisfies section 401(a)(31), even though a direct rollover option was not provided with respect to the $3,000 plan loan offset amount.

(C) No withholding is required under section 3405(c) on account of the distribution of the $3,000 plan loan offset amount because no cash or other property (other than the plan loan offset amount) is received by Employee A from which to satisfy the withholding.

(D) The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (g)(3)(ii) of this section.

Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset amount to an eligible retirement plan within the period that ends on the employee's tax filing due date (including extensions) for the taxable year in which the offset occurs.

(ii) *Example 2*—(A) The facts are the same as in *Example 1* in paragraph (g)(5)(i) of this section, except that, rather than accelerating the plan loan, Plan Y permits Employee A to continue making loan installment payments after severance from employment. Employee A continues making loan installment payments until January 1, 2021, at which time Employee A does not make the loan installment payment due on January 1, 2021. In accordance with § 1.72(p)–1, Q&A–10, Plan Y allows a cure period that continues until the last day of the calendar quarter following the quarter in which the required installment payment was due. Employee A does not make a plan loan installment payment during the cure period. Plan Y offsets the unpaid $3,000 loan balance against Employee A's account balance on July 1, 2021 (which is after the 12-month period beginning on the date that Employee A severed from employment).

(B) The conclusion is the same as in paragraph (g)(5)(i) of this section (*Example 1*), except that the $3,000 plan loan offset amount is not a qualified plan loan offset amount (because the offset did not occur within the 12-month period beginning on the date that Employee A severed from employment). Accordingly, Employee A may roll over up to the $3,000 plan loan offset amount to an eligible retirement plan within the 60-day period provided in section 402(c)(3)(A) (rather than within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs).

(iii) *Example 3*—(A) The facts are the same as in *Example 1* in paragraph (g)(5)(i) of this section, except that the terms governing the plan loan to Employee A provide that, upon severance from employment, Employee A's account balance is automatically offset by the amount of any unpaid loan balance to repay the loan. Employee A severs from employment but does not request a distribution from Plan Y. Nevertheless, pursuant to the terms governing the plan loan, Employee A's account balance is automatically offset on June 15, 2020, by the amount of the $3,000 unpaid loan balance.

(B) The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (g)(3)(ii) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset amount to an eligible retirement plan within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs.

(iv) *Example 4*—(A) The facts are the same as in *Example 1* in paragraph (g)(5)(i) of this section, except that Employee A elects to receive a cash distribution of the account balance that remains after the $3,000 plan loan offset amount, instead of electing a direct rollover of the remaining account balance.

(B) The amount of the distribution received by Employee A is $10,000 ($3,000 relating to the plan loan offset and $7,000 relating to the cash distribution). Because the amount of the $3,000 plan loan offset amount attributable to the loan is included in determining the amount of the eligible rollover distribution to which withholding applies, withholding in the amount of $2,000 (20 percent of $10,000) is required under section 3405(c). The $2,000 is required to be withheld from the $7,000 to be distributed to Employee A in cash, so that Employee A actually receives a cash amount of $5,000.

(C) The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (g)(3)(ii) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset to an eligible retirement plan within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs. In addition, Employee A may roll over up to $7,000 (the portion of the distribution that is not related to the offset) within the 60-day period provided in section 402(c)(3).

(v) *Example 5*—(A) The facts are the same as in *Example 4 in* paragraph (g)(5)(iv) of this section, except that the $7,000 distribution to Employee A after the offset consists solely of employer securities within the meaning of section 402(e)(4)(E).

(B) No withholding is required under section 3405(c) because the distribution consists solely of the $3,000 plan loan offset amount and the $7,000 distribution of employer securities. This is the result because the total amount required to be withheld does not exceed the sum of the cash and the fair market value of other property distributed, excluding plan loan offset amounts and employer securities.

(C) Employee A may roll over up to the $7,000 of employer securities to an eligible retirement plan within the 60-day period provided in section 402(c)(3). The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (g)(3)(ii) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset amount to an eligible retirement plan within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs.

(vi) *Example 6*—(A) Employee B, who is age 40, has an account balance in Plan Z. Plan Z does not provide for after-tax employee contributions. In 2022, Employee B receives a loan from Plan Z, the terms of which satisfy section 72(p)(2). The loan is secured by elective contributions subject to the distribution restrictions in section 401(k)(2)(B).

(B) Employee B fails to make an installment payment due on April 1, 2023, or any other monthly payments thereafter. In accordance with § 1.72(p)–1, Q&A–10, Plan Z allows a cure period that continues until the last day of the calendar quarter following the quarter in which the required installment payment was due (September 30, 2023). Employee B does not make a plan loan installment payment during the cure period. On September 30, 2023, pursuant to section 72(p)(1), Employee B is taxed on a deemed distribution equal to the amount of the unpaid loan balance. Pursuant to paragraph (c)(3)(iv) of this section, the deemed distribution is not an eligible rollover distribution.

(C) Because Employee B has not severed from employment or experienced any other event that permits the distribution under section 401(k)(2)(B) of the elective contributions that secure the loan, Plan Z is prohibited from executing on the loan. Accordingly, Employee B's account balance is not offset by the amount of the unpaid loan balance at the time of the deemed distribution. Thus, there is no distribution of an offset amount that is an eligible rollover distribution on September 30, 2023.

(vii) *Example 7*—(A) The facts are the same as in *Example 6* in paragraph (g)(5)(vi) of this section, except that Employee B has a severance from employment on November 1, 2023. On that date, Employee B's unpaid loan balance is offset against the account balance on distribution.

(B) The plan loan offset amount is not a qualified plan loan offset amount. Although the offset occurred within 12 months after Employee B severed from employment, the plan loan does not meet the requirement in paragraph (g)(3)(ii)(B) of this section (that the plan loan meet the requirements of section

72(p)(2) immediately prior to Employee B's severance from employment). Instead, the loan was taxable on September 30, 2023 (prior to Employee B's severance from employment on November 1, 2023), because of the failure to meet the level amortization requirement in section 72(p)(2)(C). Accordingly, Employee B may roll over the plan loan offset amount to an eligible retirement plan within the 60-day period provided in section 402(c)(3)(A) (rather than within the period that ends on Employee B's tax filing due date (including extensions) for the taxable year in which the offset occurs).

(h) *Qualified plan distributed annuity contract*—(1) *Definition of a qualified plan distributed annuity contract.* A qualified plan distributed annuity contract is an annuity contract purchased for a participant, and distributed to the participant, by a qualified plan.

(2) *Treatment of amounts paid as eligible rollover distributions.* Amounts paid under a qualified plan distributed annuity contract are payments of the balance to the credit of the employee for purposes of section 402(c) and are eligible rollover distributions if they otherwise qualify. Thus, for example, if the employee surrenders the contract for a single sum payment of its cash surrender value, the payment would be an eligible rollover distribution to the extent it is not a required minimum distribution under section 401(a)(9). This rule applies even if the annuity contract is distributed in connection with a plan termination. See § 1.401(a)(31)–1, Q&A–17 and § 31.3405(c)–1, Q&A–13 of this chapter concerning the direct rollover requirements and 20-percent withholding requirements, respectively, that apply to eligible rollover distributions from such an annuity contract.

(i) [Reserved]

(j) *Treatment of distributions to beneficiary*—(1) *Spousal distributee*—(i) *In general.* Pursuant to section 402(c)(9), if any distribution attributable to an employee is paid to the employee's surviving spouse, section 402(c) applies to the distribution in the same manner as if the spouse were the employee. The same rule applies if any distribution attributable to an employee is paid in accordance with a qualified domestic relations order (as defined in section 414(p)) (QDRO) to the employee's spouse or former spouse who is an alternate payee. Therefore, a distribution to the surviving spouse of an employee (or to a spouse or former spouse who is an alternate payee under a QDRO), including a distribution of ancillary death benefits attributable to the employee, is an eligible rollover distribution if it would be described in paragraph (c) of this section had it been paid to the employee.

(ii) *Rollovers to qualified plans must be in capacity of employee.* If a surviving spouse rolls over a distribution to a qualified plan described in paragraph (a)(1)(iii)(B)(*2*) of this section or to an eligible deferred compensation plan described in section 457(b) that is maintained by an employer described in section 457(e)(1)(A), then, with respect to the amount rolled over, that amount is treated as the spouse's own interest under the receiving plan and not the interest of the decedent under the distributing plan. Thus, for example, in determining the required minimum distribution from the receiving plan with respect to the amount rolled over, distributions must satisfy section 401(a)(9)(A) and not section 401(a)(9)(B).

(2) *Non-spousal distributee.* A distributee other than the employee or the employee's surviving spouse (or a spouse or former spouse who is an alternate payee under a QDRO) is not permitted to roll over a distribution from a qualified plan. Therefore, a distribution to a non-spousal distributee does not constitute an eligible rollover distribution under section 402(c)(4) and is not subject to the 20-percent income tax withholding under section 3405(c). However, under section 402(c)(11), if the distributee is a designated beneficiary (as determined under § 1.401(a)(9)–(4) who is not described in paragraph (j)(1) of this section and the distribution would be an eligible rollover distribution had it been paid to the employee, then the distributee may elect that the distribution be made in the form of a direct trustee-to-trustee transfer to an IRA established for the purpose of receiving that distribution. If a direct trustee-to-trustee transfer is made pursuant to section 402(c)(11) then—

(i) The transfer is treated as an eligible rollover distribution;

(ii) The IRA is an inherited IRA described in section 408(d)(3)(ii); and

(iii) Section 401(a)(9)(B) (other than section 401(a)(9)(B)(iv)) will apply to the IRA.

(3) *Determination of amounts that constitute required minimum distributions for distributions to beneficiaries*—(i) *In general*—(A) *First portion of a distribution is treated as a required minimum distribution.* If a minimum distribution is required to be made to a beneficiary in a calendar year, then the amounts distributed during that calendar year are treated as required minimum distributions under section 401(a)(9), to the extent that the total required minimum distribution under section 401(a)(9) for the calendar year has not been satisfied. Accordingly, those amounts are not eligible rollover distributions. If the employee dies before the employee's required beginning date (within the meaning of § 1.401(a)(9)–2(b)), then no amount is a required minimum distribution for the year in which the employee dies.

(B) *Determination of required minimum distribution based on distribution method.* Except as otherwise provided in paragraphs (j)(3)(ii) and (iii) of this section, if an employee dies before the employee's required beginning date, then the amount that is not an eligible rollover distribution because it is a required minimum distribution for the calendar year is determined under paragraph (j)(3)(i)(C), (D), or (E) of this section, whichever applies to the beneficiary. See § 1.401(a)(9)–3(b)(4) and (c)(5) to determine which rule applies. If an employee dies on or after the employee's required beginning date, then the amount that is not an eligible rollover distribution because it is a required minimum distribution for a calendar year is determined under paragraph (j)(3)(i)(F) of this section.

(C) *Five-year rule.* If the 5-year rule described in § 1.401(a)(9)–3(b)(2) or (c)(2) applies to the beneficiary, then no amount is required to be distributed until the end of the fifth calendar year following the calendar year of the employee's death. In that year, the entire amount to which the beneficiary is entitled under the plan must be distributed, and because it is a required minimum distribution, it is not an eligible rollover distribution. Thus, if the 5-year rule applies with respect to a designated beneficiary, then any distribution made before the fifth calendar year following the calendar year of the employee's death is eligible for rollover if it otherwise meets the requirements of this section.

(D) *Ten-year rule.* If the 10-year rule described in § 1.401(a)(9)–3(c)(3) applies to the beneficiary, then no amount is required to be distributed until the end of the tenth calendar year following the calendar year of the employee's death. In that year, the entire amount to which the beneficiary is entitled under the plan must be distributed, and because it is treated as a required minimum distribution, it is not an eligible rollover distribution. Thus, if the 10-year rule applies with respect to a designated beneficiary, then any distribution made before the tenth calendar year following the calendar year of the employee's death is eligible for rollover if it otherwise meets the requirements of this section.

(E) *Life expectancy rule.* If the life expectancy rule described in § 1.401(a)(9)–3(c)(4) (or, in the case of a defined benefit plan, the annuity payment rule described in § 1.401(a)(9)–3(b)(3)) applies to the designated beneficiary, then, in the first distribution calendar year for the beneficiary (as defined in § 1.401(a)(9)–5(a)(2)(ii)) and in each subsequent calendar year, the amount treated as a required minimum distribution and not eligible to be rolled over is determined in accordance in with § 1.401(a)(9)–5(d) and (e) (or, in the case of a defined benefit plan, § 1.401(a)(9)–6).

(F) *Employee dies on or after required beginning date.* If the employee dies on or after the employee's required beginning date, then, in the calendar year of the employee's death, the amount treated as a required minimum distribution and not eligible to be rolled over is determined in accordance with § 1.401(a)(9)–5(c) (or, in the case of a defined benefit plan, § 1.401(a)(9)–6). For each subsequent calendar year, the amount treated as a required minimum distribution and not eligible to be rolled over is determined in accordance with § 1.401(a)(9)–5(d) and (e) (or, in the case of a defined benefit plan, § 1.401(a)(9)–6).

(ii) *Exception allowing beneficiary to change distribution method.* If the 5-year rule or 10-year rule described in § 1.401(a)(9)–3(b)(2), (c)(2) or (c)(3) applies to a designated beneficiary under the plan, and the eligible designated beneficiary is using the exception under § 1.408–8(d)(2)(ii) to switch to the use of the life expectancy rule under the IRA to which the distribution is rolled over or transferred, then the designated beneficiary must determine the portion of the distribution that is a required minimum distribution that is not eligible for rollover using the life expectancy rule described in § 1.401(a)(9)–3(c)(4) (or, in the case of a defined benefit plan, the annuity payment rule described in § 1.401(a)(9)–3(b)(3)).

(iii) *Special rule applicable to a spouse beneficiary*—(A) *In general.* This paragraph (j)(3)(iii) provides a special rule relating to the determination of amounts treated as a required minimum distribution for distributions to an employee's surviving spouse to whom the 5-year rule or 10-year rule described in § 1.401(a)(9)–3(b)(2), (c)(2), or (c)(3) applies. This rule, which treats a portion of the distribution made before the last year of the 5-year or 10-year period (whichever applies to the spouse) as a required minimum distribution, applies if—

(*1*) The distribution is made in or after the calendar year the surviving spouse attains age 72; and

(2) The surviving spouse rolls over a portion of that distribution to an eligible retirement plan under which the surviving spouse is not treated as the beneficiary of the employee.

(B) *Catch-up of missed required minimum distributions.* If this paragraph (j)(3)(iii) applies to a distribution then, notwithstanding paragraph (j)(3)(i)(C) and (D) of this section, the portion of the distribution that is not an eligible rollover distribution because it is treated as a required minimum distribution is the excess (if any) of—

(1) The sum of the hypothetical required minimum distributions determined under paragraph (j)(3)(iii)(C) of this section for each year beginning with the first applicable calendar year (determined under paragraph (j)(3)(iii)(D) of this section) and ending with the calendar year in which the distribution is made, over

(2) The distributions made to the surviving spouse during those calendar years.

(C) *Calculation of required minimum distribution for calendar years prior to calendar year of distribution.* The hypothetical required minimum distribution for a calendar year described in this paragraph (j)(3)(iii)(C) is the amount that would have been the required minimum distribution for that year had the life expectancy rule applied to the surviving spouse. Thus, in the case of a defined contribution plan, the amount is calculated under § 1.401(a)(9)–5, using the applicable denominator under § 1.401(a)(9)–5(d) (or, in the case of a defined benefit plan, calculated under § 1.401(a)(9)–6). However, an adjusted account balance is used to determine the required minimum distribution for a year under this paragraph (j)(3)(iii)(C). The adjusted account balance is determined by reducing the account balance that would otherwise be used by the excess (if any) of—

(*1*) The sum of the hypothetical required minimum distributions determined under this paragraph (j)(3)(iii)(C) beginning with the first applicable year and ending with the calendar year preceding the calendar year of the determination, over

(*2*) The distributions made to the surviving spouse during those calendar years.

(D) *Definition of first applicable year.* The first applicable year is the later of—

(*1*) The calendar year in which the surviving spouse attains age 72, and

(*2*) The calendar year in which the employee would have attained age 72.

(E) *Example*—(*1*) *Facts.* Employee A is a participant in Plan X, sponsored by Employer M. A died before A's required beginning date having named A's surviving spouse, B, as the sole beneficiary. Pursuant to the terms of Plan X, B is subject to the 10-year rule. B does not take a distribution of A's entire interest in Plan X until the ninth calendar year following the year of A's death, at which time B takes a distribution of A's entire interest (valued at $100,000 as of December 31 in the calendar year preceding the calendar year of distribution) when B is age 74 (and when A would have reached age 75). B would like to roll over the distribution to B's own IRA to the extent the distribution does not constitute a required minimum distribution.

(*2*) *Catch-up of required minimum distributions required.* Because the distribution is made in a calendar year after B attained age 72, this paragraph (j)(3)(iii) applies. The first applicable year (determined in accordance with paragraph (j)(3)(iii)(D) of this section) is the calendar year in which B reached age 72 (the seventh year after the year of A's death). Pursuant to paragraph (j)(3)(iii)(B) of this section, the amount that is not an eligible rollover distribution because it is treated as a required minimum distribution under section 401(a)(9), is the sum of the hypothetical required minimum distributions, determined in accordance with paragraph (j)(3)(iii)(C) of this section for each calendar year beginning with the first applicable year and ending in the year of distribution.

(*3*) *Calculation of hypothetical required minimum distribution.* Pursuant to paragraph (j)(3)(iii)(C) of this section, the amount treated as a required minimum distribution for the first applicable year is $5,813.95 ($100,000/17.2). For the next calendar year, the account balance as of the preceding calendar year is reduced by the required minimum distribution for that calendar year, in this case, $5,813.95. This calculation will be made for each calendar year until the calendar year of the distribution and the cumulative amount of those hypothetical required minimum distributions will be treated as a required minimum distribution under section 401(a)(9) and thus, not an eligible rollover distribution.

(k) *Other rules*—(1) *Designation must be irrevocable*—(i) *Indirect rollover.* In order for a contribution of an eligible rollover distribution to an individual retirement plan to constitute a rollover and, thus, to qualify for exclusion from gross income under section 402(c), a distributee must elect, at the time the contribution is made, to treat the contribution as a rollover contribution. An election is made by designating to the trustee, issuer, or custodian of the eligible retirement plan that the contribution is a rollover contribution. This election is irrevocable. Once any portion of an eligible rollover distribution has been contributed to an individual retirement plan and designated as a rollover distribution, taxation of the withdrawal of the contribution from the individual retirement plan is determined under section 408(d) rather than under section 402 or 403. Therefore, the eligible rollover distribution is not eligible for capital gains treatment, five-year or ten-year averaging, or the exclusion from gross income for net unrealized appreciation on employer stock.

(ii) *Direct rollover.* If an eligible rollover distribution is paid to an eligible retirement plan in a direct rollover at the election of the distributee, the distributee is deemed to have irrevocably designated that the direct rollover is a rollover contribution.

(2) *Use of actual minimum required distribution calculation.* The portion of any distribution that an employee (or spousal distributee) may roll over as an eligible rollover distribution under section 402(c) is determined based on the actual application of section 402 and other relevant provisions of the Internal Revenue Code. The actual application of these provisions may produce different results than any assumption described in § 1.401(a)(31)–1, Q&A–18 that is used by the plan administrator. Thus, for example, if the plan administrator assumes there is no designated beneficiary and calculates the portion of a distribution that is a required minimum distribution using the Uniform Life Table under § 1.401(a)(9)–9(c)(2), but the portion of the distribution that is actually a required minimum distribution and thus not an eligible rollover distribution is determined by taking into account a spousal designated beneficiary who is more than 10 years younger than the employee, then a greater portion of the distribution is actually an eligible rollover distribution and the distributee may roll over the additional amount.

(3*) Plan rollover not counted towards one rollover per year limitation.* A distribution from a qualified plan that is rolled over to an individual retirement account or individual retirement annuity is not treated for purposes of section 408(d)(3)(B) as an amount received by an individual from an individual retirement account or individual retirement annuity that is not includible in gross income because of the application of section 408(d)(3).

§ 1.402(c)–3. [Removed]

■ **Par. 5.** Remove Section 1.402(c)–3.

■ **Par. 6.** Amend § 1.403(b)–6 by revising paragraph (e) to read as follows:

* * * * *

(e) *Minimum required distributions for eligible plans*—(1) *In general.* Under section 403(b)(10), a section 403(b) contract must meet the minimum distribution requirements of section 401(a)(9) (in both form and operation). See section 401(a)(9) for these requirements.

(2) *Generally treated as IRAs.* For purposes of applying the minimum distribution requirements of section 401(a)(9) to section 403(b) contracts, the minimum distribution requirements applicable to individual retirement annuities described in section 408(b) and individual retirement accounts described in section 408(a) apply to section 403(b) contracts. Consequently, except as otherwise provided in this paragraph (e), the minimum distribution requirements of section 401(a)(9) are applied to section 403(b) contracts in accordance with the provisions in § 1.408–8.

(3) *Exceptions under which qualified plan rules will apply*—(i) *Required beginning date.* The required beginning date for purposes of section 403(b)(10) is determined in accordance with § 1.401(a)(9)–2(b) (rather than § 1.408–8(b)(1)).

(ii) *Amounts not taken into account.* The amounts not taken into account in determining whether the minimum distribution requirement of section 401(a)(9) has been satisfied for a calendar year are the amounts described in § 1.402(c)–2(c)(3) (rather than the amounts described in § 1.408–8(g)(2)).

(iii) *Qualifying longevity annuity contracts.* The rules in § 1.401(a)(9)–6(q)(2)(i) (relating to limitations on premiums for a qualifying longevity annuity contract (QLAC), as defined in § 1.401(a)(9)–6(q)(1)) and § 1.401(a)(9)–6(q)(4)(i)(A) (relating to reliance on representations with respect to a QLAC) apply to the purchase of a QLAC under a section 403(b) plan (rather than the rules in § 1.408–8(h)(2) and (3)).

(4) *Surviving spouse rule does not apply.* The special rule in § 1.408–8(c) (relating to spousal beneficiaries permitting a surviving spouse to treat an IRA of the decedent as the spouse's own IRA) does not apply to a section 403(b) contract. Thus, the surviving spouse of a participant is not permitted to treat a section 403(b) contract as the spouse's own section 403(b) contract, even if the spouse is the sole beneficiary.

(5) *Retirement income accounts.* For purposes of § 1.401(a)(9)–6(d) (relating to annuity contracts purchased under a defined contribution plan), annuity payments provided with respect to retirement income accounts do not fail to satisfy the requirements of section 401(a)(9) merely because the payments are not made under an annuity contract purchased from an insurance company which is licensed to do business under the laws of the State, provided that the relationship between the annuity payments and the retirement income accounts is not inconsistent with any rules prescribed by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter). See also § 1.403(b)–9(a)(5) for additional rules relating to annuities payable from a retirement income account.

(6) *Special rules for benefits accruing before December 31, 1986*—(i) *Non-applicability of section 401(a)(9) to pre-'87 account balance.* The minimum distribution requirements of section 401(a)(9) do not apply to the undistributed portion of the account balance under a section 403(b) contract valued as of December 31, 1986, exclusive of subsequent earnings (pre-'87 account balance). The minimum distribution requirements of section 401(a)(9) apply to all benefits under any section 403(b) contract accruing after December 31, 1986 (post-'86 account balance), including earnings after December 31, 1986. Consequently, the post-'86 account balance includes earnings after December 31, 1986, on contributions made before January 1, 1987, in addition to the contributions made after December 31, 1986, and earnings thereon.

(ii) *Recordkeeping required.* The issuer or custodian of the section 403(b) contract must keep records that enable it to identify the pre-'87 account balance and subsequent changes as set forth in paragraph (d)(6)(iii) of this section and provide that information upon request to the relevant employee or beneficiaries with respect to the contract. If the issuer or custodian does not keep those records, the entire account balance is treated as subject to section 401(a)(9).

(iii) *Applicability of section 401(a)(9) to post-'86 account balance.* In applying the minimum distribution requirements of section 401(a)(9), only the post-'86 account balance is used to calculate the required minimum distribution for a calendar year. The amount of any distribution from a contract is treated as being paid from the post-'86 account balance to the extent the distribution is required to satisfy the minimum distribution requirement with respect to that contract for a calendar year. Any amount distributed in a calendar year from a contract in excess of the required minimum distribution for a calendar year with respect to that contract is treated as paid from the pre-'87 account balance, if any, of that contract.

(iv) *Rollover of amounts from pre-'87 account balance.* If an amount is distributed from the pre-'87 account balance and rolled over to another section 403(b) contract, the amount is treated as part of the post-'86 account balance in that second contract. However, if the pre-'87 account balance under a section 403(b) contract is directly transferred to another section 403(b) contract (as permitted under § 1.403(b)–10(b)), the amount transferred retains its character as a pre-'87 account balance, provided the issuer of the transferee contract satisfies the recordkeeping requirements of paragraph (e)(6)(ii) of this section.

(v) *Relevance of distinction between pre-'87 and post-'86 account balance for purposes of section 72.* The distinction between the pre-'87 account balance and the post-'86 account balance provided for under this paragraph (e)(6) of this section has no relevance for purposes of determining the portion of a distribution that is includible in income under section 72.

(vi) *Pre-'87 account balance distributions must satisfy incidental benefit requirement.* The pre-'87 account balance must be distributed in accordance with the incidental benefit requirement of § 1.401–1(b)(1)(i). Distributions attributable to the pre-'87 account balance are treated as satisfying this requirement if all distributions from the section 403(b) contract (including distributions attributable to the post-'86 account balance) satisfy the requirements of § 1.401–1(b)(1)(i) without regard to this section, and distributions attributable to the post-'86 account balance satisfy the rules of this paragraph (e) (without regard to this paragraph (e)(6)). Distributions attributable to the pre-'87 account balance are treated as satisfying the incidental benefit requirement if all distributions from the section 403(b) contract (including distributions attributable to both the pre-'87 account balance and the post-'86 account balance) satisfy the rules of this paragraph (e) (without regard to this paragraph (e)(6)).

(7) *Application to multiple contracts for an employee.* The required minimum distribution must be determined separately for each section 403(b) contract of an employee. However, because, as provided in paragraph (e)(2) of this section, the minimum distribution requirements of section 401(a)(9) apply to section 403(b) contracts in accordance with the provisions in § 1.408–8, the required minimum distribution from one section 403(b) contract of an employee is permitted to be distributed from another section 403(b) contract in order to satisfy the minimum distribution requirements of section 401(a)(9). Thus, as provided in § 1.408–8(e), with respect to IRAs, the required minimum distribution amount from each contract is then totaled and the total minimum distribution taken from any one or more of the individual section 403(b) contracts. However, consistent with the rules in § 1.408–8(e), only amounts in section 403(b) contracts that an individual holds as an employee may be aggregated. In addition, amounts in section 403(b) contracts that a person holds as a beneficiary of a decedent may be aggregated, but those amounts may not be aggregated with amounts held in section 403(b) contracts that the person holds as the employee or as the beneficiary of another decedent. Distributions from section 403(b) contracts do not satisfy the minimum distribution requirements for IRAs, nor do distributions from IRAs satisfy the minimum distribution requirements for section 403(b) contracts.

(8) *Governmental plans.* A section 403(b) contract that is part of a governmental plan (within the meaning of section 414(d)) is treated as having complied with section 401(a)(9) for all years to which section 401(a)(9) applies to the contract, if the terms of the contract reflect a reasonable, good faith interpretation of section 401(a)(9).

(9) *Effective date.* This paragraph (e) applies for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2022. For earlier calendar years, the rules of 26 CFR 1.403(b)–6(e) (revised as of April 1, 2021) apply.

* * * * *

■ **Par. 7.** Revise § 1.408–8 to read as follows:

§ 1.408–8 Distribution requirements for individual retirement plans.

(a) *Applicability of section 401(a)(9)*—(1) *In general.* An IRA is subject to the required minimum distribution requirements of section 401(a)(9). In order to satisfy section 401(a)(9), the rules of §§ 1.401(a)(9)–1 through 1.401(a)(9)–9 must be applied, except as otherwise provided in this section. For example, if the owner of an individual retirement account dies before the IRA owner's required beginning date, whether the 10-year rule or the life expectancy rule applies to distributions after the IRA owner's death is determined in accordance with § 1.401(a)(9)–3(c), and the rules of § 1.401(a)(9)–4 apply for purposes of determining an IRA owner's designated beneficiary. Similarly, the amount of the minimum distribution required for each calendar year from an individual account is determined in accordance with § 1.401(a)(9)–5.

(2) *Definition of IRA and IRA owner.* For purposes of this section, an IRA is an individual retirement account or annuity described in section 408(a) or (b), and the IRA owner is the individual for whom an IRA is originally established by contributions for the benefit of that individual and that individual's beneficiaries.

(3) *Substitution of specific terms.* For purposes of applying the required minimum distribution rules of §§ 1.401(a)(9)–1 through 1.401(a)(9)–9, the IRA trustee, custodian, or issuer is treated as the plan administrator, and the IRA owner is substituted for the employee.

(4) *Treatment of SEPs and SIMPLE IRA Plans.* IRAs that receive employer contributions under a SEP arrangement (within the meaning of section 408(k)) or a SIMPLE IRA plan (within the meaning of section 408(p)) are treated as IRAs, rather than employer plans, for purposes of section 401(a)(9) and are, therefore, subject to the distribution rules in this section.

(b) *Different rules for IRAs and qualified plans*—(1) *Determination of required beginning date*—(i) *In general.* An IRA owner's required beginning date is determined using the rules for employees who are 5% owners under § 1.401(a)(9)–2(b)(3). Thus, the IRA owner's required beginning date is April 1 of the calendar year following the calendar year in which the individual attains age 72 (or 70½ in the case of an IRA owner born before July 1, 1949).

(ii) *Special rules for Roth IRAs.* No minimum distributions are required to be made from a Roth IRA while the owner is alive. After the Roth IRA owner dies, the required minimum distribution rules apply to the Roth IRA as though the Roth IRA owner died before his or her required beginning date. If the sole beneficiary is the Roth IRA owner's surviving spouse, then the surviving spouse may delay distributions until the Roth IRA owner would have attained age 72 (or 70½ in the case of a Roth IRA owner born before July 1, 1949).

(2) *Account balance determination.* For purposes of determining the required minimum distribution from an IRA for any calendar year, the account balance of the IRA as of December 31 of the calendar year preceding the calendar year for which distributions are required to be made is substituted for the account balance of the employee under § 1.401(a)(9)–5(b). Except as provided in paragraph (d) of this section, no adjustments are made for contributions or distributions after that date.

(3) *Determination of portion of distribution that is a required minimum distribution.* The portion of a distribution from an IRA that is a required minimum distribution and thus not eligible for rollover is determined in the same manner as provided in §§ 1.402(c)–2(f) and (j)(3) for a distribution from a qualified plan. For example, if a minimum distribution to an IRA owner is required under section 401(a)(9)(A)(ii) for a calendar year, any amount distributed during a calendar year from an IRA of that IRA owner is treated as a required minimum distribution under section 401(a)(9) to the extent that the total required minimum distribution for the year under section 401(a)(9) from all of that IRA owner's IRAs has not been satisfied (either by a distribution from the IRA or, as permitted under paragraph (e) of this section, from another IRA).

(c) *Surviving spouse treating IRA as own*—(1) *Election generally permitted*—(i) *In general.* The surviving spouse of an individual may elect, in the manner described in paragraph (c)(2) of this section, to treat the surviving spouse's entire interest as a beneficiary in the individual's IRA (or the remaining part of that interest if distributions have begun) as the surviving spouse's own IRA.

(ii) *Timing of election.* The election described in this paragraph (c)(1) may not be made after the later of—

(A) The calendar year in which the surviving spouse reaches age 72; and

(B) The calendar year following the calendar year of the individual's death.

(iii) *Eligibility to make election.* In order to make the election described in this paragraph (c)(1), the surviving spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a trust is named as beneficiary of the IRA, this requirement is not satisfied even if the surviving spouse is the sole beneficiary of the trust.

(2) *Election procedures.* The election described in paragraph (c)(1) of this section is made by the surviving spouse redesignating the account as an account in the name of the surviving spouse as IRA owner rather than as beneficiary. Alternatively, a surviving spouse eligible to make the election is deemed to have made the election if, at any time, either of the following occurs—

(i) Any amount in the IRA that would be required to be distributed to the surviving spouse as beneficiary under section 401(a)(9)(B) is not distributed within the time period required under section 401(a)(9)(B); or

(ii) A contribution (other than a rollover of a distribution from an eligible retirement plan of the decedent) is made to the IRA.

(3) *Effect of election.* Following an election described in paragraph (c)(1) of this section, the surviving spouse is considered the IRA owner for whose benefit the trust is maintained for all purposes under the Internal Revenue Code (including section 72(t)). Thus, for example, the required minimum distribution for the calendar year of the election and each subsequent calendar year is determined under section 401(a)(9)(A) with the spouse as IRA owner and not section 401(a)(9)(B) with the surviving spouse as the deceased IRA owner's beneficiary. However, if the election is made in the calendar year during which the IRA owner's death occurs, the spouse is not required to take a required minimum distribution as the IRA owner for that calendar year. Instead, the spouse is required to take a required minimum distribution for that year, determined with respect to the deceased IRA owner under the rules of § 1.401(a)(9)–5(c), to the extent the distribution was not made to the IRA owner before death.

(d) *Treatment of rollovers and transfers*—(1) *Treatment of rollovers*—(i) *In general.* If a distribution is rolled over to an IRA, then the rules in § 1.401(a)(9)–7 apply for purposes of determining the account balance and the required minimum distribution for that IRA. However, because the value of the account balance is determined as of December 31 of the year preceding the year for which the required minimum distribution is being determined, and not as of a valuation date in the preceding year, the account balance of the IRA is adjusted only if the amount rolled over is not received in the calendar year in which the amount was distributed. If the amount rolled over is received in the calendar year following the calendar year in which the amount was distributed, then, for purposes of determining the required minimum distribution for that following calendar year, the account balance of the IRA as of December 31 of the calendar year in which the distribution was made must be adjusted by the amount received in accordance with § 1.401(a)(9)–7(b).

(ii) *Spousal rollovers.* A surviving spouse is permitted to roll over a distribution to an IRA as the beneficiary of the deceased employee or IRA owner, and the rules of paragraph (d)(1)(i) of this section apply to that IRA. A surviving spouse may also elect to treat that IRA as the spouse's own IRA in accordance with paragraph (c) of this section.

(2) *Special rules for death before required beginning date*—(i) *Carryover of election under qualified plan or IRA.* If an employee or IRA owner dies before the required beginning date and the surviving spouse rolls over a distribution of the employee's or IRA owner's interest to an IRA in the spouse's capacity as a beneficiary of the deceased employee or IRA owner, then, except as provided in paragraph (d)(2)(ii) of this section, the method for determining required minimum distributions that applied to that surviving spouse under the distributing plan or IRA (such as when a beneficiary makes an election described in § 1.401(a)(9)–3(c)(5)(iii)) also applies to the receiving IRA. Thus, for example, if an employee who died before the required beginning date designated the employee's surviving spouse as a beneficiary of the employee's interest in the plan and the plan provides that the surviving spouse is subject to the 10-year rule described in § 1.401(a)(9)–3(c)(4), then the 10-year rule also applies to any IRA in the name of the decedent that receives a rollover of the employee's interest.

(ii) *Change from 5-year rule or 10-year rule to life expectancy payments.* If the 5-year rule or 10-year rule described in § 1.401(a)(9)–3(b)(2), (c)(2), or (c)(3), respectively, applies to a distributing plan or IRA and a distribution is made to the employee's surviving spouse before the deadline described in § 1.401(a)(9)–3(b)(4)(iii) or (c)(5)(iii) that would have applied had the distributing plan or IRA permitted the surviving spouse to make an election between the 5-year rule or 10-year rule and the life expectancy rule (or, in the case of a defined benefit plan, the annuity payment rule), then the surviving spouse may elect to have the life expectancy rule described in § 1.401(a)(9)–3(c)(4) or the annuity payment rule described in § 1.401(a)(9)–3(b)(3) apply to any IRA to which any portion of that distribution is rolled over. However, see § 1.402(c)–2(j)(3)(ii) to determine the portion of that distribution that is treated as a required minimum distribution in the calendar year of the distribution and thus is not eligible for rollover.

(iii) *Spousal rollover to spouse's own IRA.* If an employee or IRA owner dies before the required beginning date and the surviving spouse rolls over a distribution described in paragraph (d)(2)(i) of this section from the surviving spouse's IRA in the capacity as the beneficiary of the decedent to the surviving spouse's own IRA, then, in determining the amount that is treated as a required minimum distribution under section 401(a)(9) and thus is not eligible for rollover, the rules of § 1.402(c)–2(j)(3)(iii) are applied as if the distribution was made directly from the decedent's interest in the plan or IRA to the surviving spouse's own IRA.

(3) *Applicability of rollover rules to non-spouse beneficiary.* The rules of paragraphs (d)(1), (d)(2)(i) and (d)(2)(ii) of this section apply to a non-spouse beneficiary who makes an election to have a distribution made in the form of a direct trustee-to-trustee transfer as described in section 402(c)(11) in the same manner as a rollover of a distribution made by a surviving spouse.

(4) *Treatment of transfers.* In the case of a trustee-to-trustee transfer from one IRA to another IRA that is not a distribution and rollover, the transfer is not treated as a distribution by the transferor IRA for purposes of section 401(a)(9). Accordingly, the minimum distribution requirement with respect to the transferor IRA must still be satisfied. After the transfer, the employee's account balance and the required minimum distribution under the transferee IRA are determined in the same manner that an account balance and required minimum distribution are determined under an IRA receiving a rollover contribution under paragraph (d)(1) of this section.

(e) *Owners of multiple IRAs*—(1) *In general.* The required minimum distribution from one IRA is permitted to be distributed from another IRA in order to satisfy section 401(a)(9), subject to the limitations of paragraph (e)(2) and (3) of this section. The required minimum distribution must be calculated separately for each IRA and the separately calculated amounts may then be totaled and the total distribution taken from any one or more of the IRAs under the rules set forth in this paragraph (e).

(2) *IRAs must be of the same owner.* Generally, only amounts in IRAs that an individual holds as the IRA owner may be aggregated. Except in the case of a surviving spouse electing to treat a decedent's IRA as the spouse's own IRA, an IRA that a beneficiary acquires as a result of the death of an individual is not treated as an IRA of the beneficiary but rather as an IRA of the decedent for purposes of this paragraph (e). Thus, for example, for purposes of satisfying the minimum distribution requirements with respect to one IRA by making distributions from another IRA, IRAs for which the individual is the IRA owner are not aggregated with IRAs for which the individual is a beneficiary. In addition, IRAs that a person holds as a beneficiary of a decedent may be aggregated, but those amounts may not be aggregated with IRAs that the person holds as the owner or as the beneficiary of another decedent.

(3) *Non-Roth IRAs are treated separately from section 403(b) contracts and Roth IRAs.* Distributions from an IRA that is not a Roth IRA may not be used to satisfy the required minimum distribution requirements with respect to a Roth IRA, or a section 403(b) contract (as defined in § 1.403(b)–2(b)(16)(i)). Similarly, distributions from a Roth IRA do not satisfy the required minimum distribution requirements with respect to a section 403(b) contract or an IRA that is not a Roth IRA. In addition, distributions from a section 403(b) contract do not satisfy the required minimum distribution requirements with respect to an IRA.

(f) *Reporting requirements.* The trustee, custodian, or issuer of an IRA is required to report information with respect to the minimum amount required to be distributed from the IRA for each calendar year to individuals or entities, at the time, and in the manner, prescribed by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter), as well as the applicable Federal tax forms and accompanying instructions.

(g) *Distributions taken into account*—(1) *General rule.* Except as provided in paragraph (g)(2) of this section, all amounts distributed from an IRA are taken into account in determining whether section 401(a)(9) is satisfied, regardless of whether the amount is includible in income.

(2) *Amounts not taken into account.* The following amounts are not taken into account in determining whether the required minimum distribution with respect to an IRA for a calendar year has been made—

(i) Contributions returned pursuant to section 408(d)(4), together with the income allocable to these contributions;

(ii) Contributions returned pursuant to section 408(d)(5);

(iii) Corrective distributions of excess simplified employee pension contributions under section 408(k)(6)(C), together with the income allocable to these distributions;

(iv) Amounts that are treated as distributed pursuant to section 408(e);

(v) Amounts that are deemed to be distributed with respect to collectibles pursuant to section 408(m);

(vi) Corrective distributions of excess deferrals as described in § 1.402(g)–1(e)(3), together with the income allocable to these corrective distributions; and

(vii) Similar items designated by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d) of this chapter.

(h) *Qualifying longevity annuity contracts*—(1) *General rule.* The special rule in § 1.401(a)(9)–5(b)(4) for a QLAC, defined in § 1.401(a)(9)–6(q), applies to an IRA, subject to the modifications set forth in this paragraph (h).

(2) *Limitations on premiums*—(i) *In general.* In lieu of the limitations on premiums described in § 1.401(a)(9)–6(q)(2)(i), the limitation on premiums paid with respect to the contract on a date is the lesser of—

(A) The dollar limitation in paragraph (h)(2)(ii) of this section; and

(B) The percentage limitation in paragraph (h)(2)(iii) of this section.

(ii) *Dollar limitation.* The dollar limitation is the amount by which $125,000 (as adjusted under § 1.401(a)(9)–6(q)(4)(ii)(A)) exceeds the sum of—

(A) The premiums paid before that date with respect to the contract, and

(B) The premiums paid on or before that date with respect to any other contract that is intended to be a QLAC and that is purchased for the IRA owner under the IRA, or any other plan, annuity, or account described in section 401(a), 403(a), 403(b), or 408 or eligible governmental plan under section 457(b).

(iii) *Percentage limitation.* The percentage limitation is the amount by which 25 percent of the total account balances of the IRAs (other than Roth IRAs) that an individual holds as the IRA owner (including the value of any QLAC held under those IRAs) as of December 31 of the calendar year preceding the calendar year in which a premium is paid, exceeds the sum of—

(A) The premiums paid before that date with respect to the contract, and

(B) The premiums paid on or before that date with respect to any other contract that is intended to be a QLAC and that is held or was purchased for the individual under those IRAs.

(3) *Reliance on representations.* For purposes of the limitations described in paragraphs (h)(2)(ii) and (iii) of this

section, unless the trustee, custodian, or issuer of an IRA has actual knowledge to the contrary, the trustee, custodian, or issuer may rely on the IRA owner's representation (made in writing or other form as may be prescribed by the Commissioner) of—

(i) The amount of the premiums described in paragraphs (h)(2)(ii) and (iii) of this section that are not paid under the IRA, and

(ii) The amount of the account balances described in paragraph (h)(2)(iii) of this section (other than the account balance under the IRA).

(4) *Permitted delay in setting beneficiary designation.* In the case of a contract that is rolled over from a plan to an IRA before the required beginning date under the plan, the contract will not violate the rule in § 1.401(a)(9)–6(q)(3)(iii)(F) that a non-spouse beneficiary must be irrevocably selected on or before the later of the date of purchase or the required beginning date under the IRA, provided that the contract requires a beneficiary to be irrevocably selected by the end of the year following the year of the rollover.

(5) *Roth IRAs.* The rule in § 1.401(a)(9)–5(b)(4) does not apply to a Roth IRA. Accordingly, a contract that is purchased under a Roth IRA is not treated as a contract that is intended to be a QLAC for purposes of applying the dollar and percentage limitation rules in paragraphs (h)(2)(ii) and (iii) of this section. If a QLAC is purchased or held under a plan, annuity, account, or traditional IRA, and that contract is later rolled over or converted to a Roth IRA, the contract is not treated as a contract that is intended to be a QLAC after the date of the rollover or conversion. Thus, premiums paid with respect to the contract will not be taken into account under paragraph (h)(2)(ii) and (iii) of this section after the date of the rollover or conversion.

(i) [Reserved].

(j) *Applicability date.* This section applies for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2022. For earlier calendar years, the rules of 26 CFR 1.408–8 (revised as of April 1, 2021) apply.

■ **Par. 8.** Amend § 1.457–6 by revising paragraph (d) to remove the last sentence.

PART 54—PENSION EXCISE TAXES

■ **Par. 9.** The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 10.** Revise § 54.4974–1 to read as follows:

§ 54.4974–1 Excise tax on accumulations in qualified retirement plans.

(a) *Imposition of excise tax.* If the amount distributed to a payee under any qualified retirement plan or any eligible deferred compensation plan (as defined in section 457(b)) for a calendar year is less than the required minimum distribution for that year, section 4974 imposes an excise tax on the payee for the taxable year beginning with or within the calendar year during which the amount is required to be distributed. The tax is equal to 50 percent of the amount by which the required minimum distribution exceeds the actual amount distributed during the calendar year. Section 4974 provides that this tax shall be paid by the payee. For purposes of section 4974, the term required minimum distribution means the minimum amount required to be distributed pursuant to section 401(a)(9), 403(b)(10), 408(a)(6), 408(b)(3), or 457(d)(2), as the case may be. Except as otherwise provided in paragraph (f) of this section (which provides a special rule for amounts required to be distributed by an employee's, or an individual's, required beginning date), the required minimum distribution for a calendar year is the required minimum distribution amount required to be distributed during the calendar year.

(b) *Definition of qualified retirement plan.* For purposes of section 4974, each of the following is a qualified retirement plan—

(1) A plan described in section 401(a) that includes a trust exempt from tax under section 501(a);

(2) An annuity plan described in section 403(a);

(3) An annuity contract, custodial account, or retirement income account described in section 403(b);

(4) An individual retirement account described in section 408(a) (including a Roth IRA described in section 408A);

(5) An individual retirement annuity described in section 408(b) (including a Roth IRA described in section 408A); or

(6) Any other plan, contract, account, or annuity that, at any time, has been treated as a plan, account, or annuity described in paragraphs (b)(1) through (5) of this section but that no longer satisfies the applicable requirements for that treatment.

(c) *Determination of required minimum distribution for individual accounts*—(1) *General rule.* Except as otherwise provided in this paragraph (c), if a payee's interest under a qualified retirement plan or any eligible deferred compensation plan is in the form of an individual account (and distribution of that account is not being made under an annuity contract purchased in accordance with § 1.401(a)(9)–5(a)(5) and § 1.401(a)(9)–6(d)), the amount of the required minimum distribution for any calendar year for purposes of section 4974 is the amount required to be distributed to that payee for that calendar year determined in accordance with § 1.401(a)(9)–5 as provided in the following (whichever is applicable)—

(i) Section 401(a)(9), §§ 1.401(a)(9)–1 through 1.401(a)(9)–5, and 1.401(a)(9)–7 through 1.401(a)(9)–9, in the case of a plan described in section 401(a) that includes a trust exempt under section 501(a) or an annuity plan described in section 403(a);

(ii) Section 403(b)(10) and § 1.403(b)–6(e) in the case of an annuity contract, custodial account, or retirement income account described in section 403(b);

(iii) Section 408(a)(6) or (b)(3) and § 1.408–8 in the case of an individual retirement account or annuity described in section 408(a) or (b); or

(iv) Section 457(d) and § 1.457–6(d) in the case of an eligible deferred compensation plan.

(2) *Distributions under 5-year rule or 10-year rule.* If an employee dies before the required beginning date and either § 1.401(a)(9)–3(c)(2) or (3) applies to the employee's beneficiary, there is no required minimum distribution until the end of the calendar year described in whichever of those paragraphs applies to the beneficiary (that is, the fifth year or the tenth year after the calendar year of the employee's death, as applicable). The required minimum distribution due in that fifth or tenth calendar year is the employee's entire interest in the plan.

(3) *Default provisions.* Unless otherwise provided under the qualified retirement plan or eligible deferred compensation plan (or, if applicable, the governing instrument of the plan), the default provisions in § 1.401(a)(9)–3(c)(5)(i) apply in determining whether paragraph (c)(1) or (c)(2) of this section applies.

(d) *Determination of required minimum distribution under a defined benefit plan or annuity*—(1) *General rule.* If a payee's interest in a qualified retirement plan or eligible deferred compensation plan is being distributed in the form of an annuity (either directly from the plan, in the case of a defined benefit plan, or under an annuity contract purchased from an insurance company), then the amount of the required minimum distribution for purposes of section 4974 depends on whether the annuity is a permissible annuity distribution option or an impermissible annuity distribution option. For this purpose—

(i) A permissible annuity distribution option is an annuity contract (or, in the case of annuity distributions from a defined benefit plan, a distribution option) that specifically provides for distributions that, if made as provided, would for every calendar year equal or exceed the minimum distribution amount required to be distributed to satisfy the applicable section enumerated in paragraph (b) of this section for that calendar year; and

(ii) An impermissible annuity distribution option is any other annuity distribution option.

(2) *Permissible annuity distribution option.* If the annuity contract (or, in the case of annuity distributions from a defined benefit plan, a distribution option) under which distributions to the payee are being made is a permissible annuity distribution option, then the required minimum distribution for a given calendar year for purposes of section 4974 equals the amount that the annuity contract (or distribution option) provides is to be distributed for that calendar year.

(3) *Impermissible annuity distribution option*—(i) *General rule.* If the annuity contract (or, in the case of annuity distributions from a defined benefit plan, the distribution option) under which distributions to the payee are being made is an impermissible annuity distribution option, then the required minimum distribution for each calendar year for purposes of section 4974 is the amount that would be distributed under the applicable permissible annuity distribution option described in this paragraph (d)(3) (or the amount determined by the Commissioner if there is no option of this type). The determination of which permissible annuity distribution applies depends on whether distributions commenced before the death of the employee, whether the plan is a defined benefit or defined contribution plan, whether there is a designated beneficiary for purposes of section 401(a)(9), and whether the designated beneficiary is an eligible designated beneficiary under section 401(a)(9)(E)(ii). For this purpose, the determination of whether there is a designated beneficiary and whether that designated beneficiary is an eligible designated beneficiary is made in accordance with § 1.401(a)(9)–4, and the determination of which designated beneficiary's life is to be used in the case of multiple designated beneficiaries in made in accordance with § 1.401(a)(9)–5(f).

(ii) *Defined benefit plan*—(A) *Benefits commence before employee dies.* If the plan under which distributions are being made is a defined benefit plan, benefits commence before the employee dies, and there is a designated beneficiary, then the applicable permissible annuity distribution option is the joint and survivor annuity option under the plan for the lives of the employee and the designated beneficiary that is a permissible annuity distribution option and that provides for the greatest level amount payable to the employee determined on an annual basis. If the plan does not provide an option described in the preceding sentence (or there is no designated beneficiary under the impermissible annuity distribution option), then the applicable permissible annuity distribution option is the life annuity option under the plan payable for the life of the employee in level amounts with no survivor benefit.

(B) *Employee dies before benefits commence.* If the plan under which distributions are being made is a defined benefit plan, the employee dies before benefits commence, there is a designated beneficiary, and the plan has a life annuity option payable for the life of the designated beneficiary in level amounts, then the applicable permissible annuity distribution option is that life annuity option. If there is no designated beneficiary, then the 5-year rule in section 401(a)(9)(B)(ii) applies in accordance with paragraph (d)(4)(i) of this section.

(iii) *Defined contribution plan*—(A) *In general.* If the plan under which distributions are being made is a defined contribution plan and the impermissible annuity distribution option is an annuity contract purchased from an insurance company, then the applicable permissible annuity distribution option is the applicable annuity described in paragraph (d)(3)(iii)(B) or (C) of this section that could have been purchased with the portion of the employee's or individual's account that was used to purchase the annuity contract that is the impermissible annuity distribution option. The amount of the payments under that annuity contract are determined using the interest rate prescribed under section 7520 determined as of the date the contract was purchased, the ages of the annuitants on that date, and the mortality rates in § 1.401(a)(9)–9(e).

(B) *Benefits commence before employee dies.* If the plan under which distributions are being made is a defined contribution plan, the benefits commence before the employee dies, and there is a designated beneficiary who is an eligible designated beneficiary within the meaning of section 401(a)(9)(E)(ii), then the applicable annuity is the joint and survivor annuity option providing level annual payments for the lives of the employee and the designated beneficiary, under which the amount of the periodic payment that would have been payable to the survivor is the applicable percentage under the table in § 1.401(a)(9)–6(b)(2) (taking into account the rules of § 1.401(a)(9)–6(k)(2)) of the amount of the periodic payment that would have been payable to the employee or individual. If there is no designated beneficiary, or if the designated beneficiary is not an eligible designated beneficiary under the impermissible distribution option, then the annuity described in this paragraph (d)(3)(iii)(B) is a life annuity for the life of the employee with no survivor benefit that provides level annual payments.

(C) *Employee dies before benefits commence.* If the plan under which distributions are being made is a defined contribution plan, the employee dies before benefits commence, and there is an eligible designated beneficiary under the impermissible annuity distribution option, then the applicable annuity is a life annuity for the life of the designated beneficiary that provides level annual payments and that would have been a permissible annuity distribution option. If there is no designated beneficiary, then section 401(a)(9)(B)(ii) applies in accordance with paragraph (d)(4)(i) of this section. If the designated beneficiary is not an eligible designated beneficiary, then section 401(a)(9)(B)(ii) applies in accordance with paragraph (d)(4)(ii) of this section.

(4) *Application of section 401(a)(9)(B)(ii)*—(i) *Application of 5-year rule.* If the 5-year rule in section 401(a)(9)(B)(ii) applies to the distribution to the payee under the contract (or distribution option), then no amount is required to be distributed to satisfy the applicable enumerated section in paragraph (b) of this section until the end of the calendar year that includes the date 5 years after the date of the employee's death. For the calendar year that includes the date 5 years after the employee's death, the amount required to be distributed to satisfy the applicable enumerated section is the payee's entire remaining interest in the annuity contract (or under the plan in the case of distributions from a defined benefit plan). However, see § 1.401(a)(9)–6(j) for rules regarding payments that are not permitted under section 436.

(ii) *Application of 10-year rule.* If the employee dies before distribution of the employee's entire interest, section

401(a)(9)(H) applies, and the designated beneficiary of the remaining interest is not an eligible designated beneficiary, then no amount is required to be distributed to satisfy the applicable enumerated section in paragraph (b) of this section until the end of the calendar year that includes the date 10 years after the date of the employee's death. For the calendar year that includes the date 10 years after the employee's death, the amount required to be distributed to satisfy the applicable enumerated section is the payee's entire remaining interest in the annuity contract.

(5) *Plans providing uniform required beginning date.* For purposes of this section, if the plan provides a uniform required beginning date for purposes of section 401(a)(9) for all employees in accordance with § 1.401(a)(9)–2(b)(4), then the required minimum distribution for each calendar year for an employee who is not a 5-percent owner is the lesser of the amount determined based on the required beginning date as set forth in § 1.401(a)(9)–2(b)(1)(i), or (b)(2)(i)(A) (whichever applies to the employee, and without regard to whether the employee is a 5-percent owner) or the required beginning date under the plan. Thus, for example, if an employee born after July 1, 1949, who was not a 5-percent owner, participated in a defined contribution plan with a uniform required beginning date (as described in the preceding sentence) and the employee died after attaining age 72 (but before April 1 of the calendar year following the calendar year in which the employee retired) without a designated beneficiary, then required minimum distributions for calendar years after the calendar year that includes the employee's date of death may be based on the lesser of—

(i) The required minimum distribution determined by treating the employee as dying before the required beginning date (that is, the 5-year rule of § 1.401(a)(9)–3(c)(2)); or

(ii) The required minimum distribution determined by treating the employee as dying on or after the required beginning date (annual distributions over the employee's remaining life expectancy, as set forth in § 1.401(a)(9)–5(d)).

(e) *Distribution of remaining benefit after deadline for required distribution.* If there is any remaining benefit with respect to an employee (or IRA owner) after the calendar year in which the entire remaining benefit is required to be distributed, the required minimum distribution for each calendar year subsequent to that calendar year is the entire remaining benefit. Thus, for example, if the designated beneficiary of the employee is not an eligible designated beneficiary, then, pursuant to § 1.401(a)(9)–5(e)(2), the entire interest of the employee must be distributed no later than the end of the tenth calendar year following the calendar year of the employee's death and the required minimum distribution for that calendar year and each subsequent calendar year is the remaining portion of the employee's interest in the plan.

(f) *Excise tax for first distribution calendar year.* If the amount not paid is an amount required to be paid by April 1 of a calendar year that includes the employee's required beginning date, the missed distribution is a required minimum distribution for the previous calendar year (that is, for the employee's or the individual's first distribution calendar year as determined in accordance with § 1.401(a)(9)–5(a)(2)(ii)). However, the excise tax under section 4974 is imposed for the calendar year that includes the last day by which the amount is required to be distributed (that is, the calendar year that includes the employee's or individual's required beginning date) even though the preceding calendar year is the calendar year for which the amount is required to be distributed. There is also a required minimum distribution for the calendar year that includes the employee's or individual's required beginning date, and that distribution is also required to be made during the calendar year that includes the employee's or individual's required beginning date.

(g) *Waiver of excise tax*—(1) *General rule.* The tax under paragraph (a) of this section may be waived if the payee establishes to the satisfaction of the Commissioner that—

(i) The failure to distribute the required minimum distribution described in this section was due to reasonable error; and

(ii) Reasonable steps are being taken to remedy the failure.

(2) *Automatic waiver after election to distribute within 10 years of employee's death.* Unless the Commissioner determines otherwise, the tax under paragraph (a) of this section is waived automatically if—

(i) The employee's or individual's death is before the employee's or individual's required beginning date;

(ii) The payee is an individual—

(A) Who is an eligible designated beneficiary (as defined in § 1.401(a)(9)–4(e));

(B) Whose required minimum distribution amount for a calendar year is determined under the life expectancy rule described in § 1.401(a)(9)–3(c)(4); and

(C) Who did not make an affirmative election to have the life expectancy rule apply as described in § 1.401(a)(9)–3(c)(5)(iii);

(iii) The payee fails to satisfy the minimum distribution requirement; and

(iv) The payee elects the 10-year rule described in § 1.401(a)(9)–3(c)(3) by the end of the ninth calendar year following the calendar year of the employee's death.

(3) *Automatic waiver for failure to take required minimum distribution for the year of death.* Unless the Commissioner determines otherwise, the tax under paragraph (a) of this section is waived automatically if—

(i) A distribution is required to be made to an individual under § 1.401(a)(9)–3 or § 1.401(a)(9)–5 in a calendar year;

(ii) The individual who was required to take the distribution described in paragraph (g)(3)(i) of this section died in that calendar year without satisfying that distribution requirement; and

(iii) The beneficiary of the individual described in paragraph (g)(3)(ii) of this section satisfies that distribution requirement no later than the tax filing deadline (including extensions thereof) for the taxable year of that beneficiary that begins with or within that calendar year.

(h) *Applicability date.* This section applies for taxable years beginning on or after January 1, 2022. For earlier taxable years, the rules of 26 CFR 54.4974–2 (revised as of April 1, 2021) apply.

§ 54.4974–2 Excise Tax on Accumulations in Qualified Retirement Plans [Removed]

■ **Par. 11.** Remove § 54.4974–2.

* * * * *

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2022–02522 Filed 2–23–22; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 87 Thursday,
No. 37 February 24, 2022

Part IV

Department of Homeland Security

8 CFR Parts 212 and 245
Public Charge Ground of Inadmissibility; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 212 and 245

[CIS No. 2715–22; DHS Docket No. USCIS–2021–0013]

RIN 1615–AC74

Public Charge Ground of Inadmissibility

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) proposes to prescribe how it determines whether a noncitizen is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act (INA) because they are likely at any time to become a public charge. Noncitizens who seek adjustment of status or a visa, or who are applicants for admission, must establish that they are not likely at any time to become a public charge, unless Congress has expressly exempted them from this ground of inadmissibility or has otherwise permitted them to seek a waiver of inadmissibility. Under this proposed rule, a noncitizen would be considered likely at any time to become a public charge if they are likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. In August of 2019, DHS issued a different rule on this topic, which is no longer in effect. This proposed rule, if finalized, would implement a different policy than the August 2019 Final Rule.

DATES: Written comments and related material must be submitted on or before April 25, 2022.

ADDRESSES: You may submit comments on this NPRM, identified by DHS Docket No. USCIS–2021–0013, through the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to the Department of Homeland Security (DHS) or U.S. Citizenship and Immigration Services (USCIS) officials, will not be considered comments on the NPRM and may not be considered by DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is not accepting mailed comments. If you cannot submit your comment by using *https://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Andrew Parker, Branch Chief, Residence and Admissibility Branch, Residence and Naturalization Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, DHS, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721–3000 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Table of Contents

Table of Abbreviations

ADA—Americans with Disabilities Act
ANPRM—Advance Notice of Proposed Rulemaking
ASC—Application Support Center
BIA—Board of Immigration Appeals
BLS—Bureau of Labor Statistics
CBP—Customs and Border Protection
CDC—Centers for Disease Control and Prevention
CFR—Code of Federal Regulations
CHIP—Children's Health Insurance Program
COS—Change of Status
COVID–19—Coronavirus Disease 2019
DACA—Deferred Action for Childhood Arrivals
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
DOJ—Department of Justice
EOS—Extension of Stay
FAM—Department of State Foreign Affairs Manual
FBR—Federal Benefit Rate
FDA—Food and Drug Administration
HCBS—Home and Community Based Services
HCV—Housing Choice Voucher
HHS—U.S. Department of Health and Human Services
HSA—Homeland Security Act
HUD—U.S. Department of Housing and Urban Development
IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
IRCA—Immigration Reform and Control Act
LPR—Lawful Permanent Resident
LRIF—Liberian Refugee Immigration Fairness Act
NACARA—Nicaraguan Adjustment and Central American Relief Act
NATO—North Atlantic Treaty Organization

NEPA—National Environmental Policy Act
NOID—Notice of Intent to Deny
NPRM—Notice of Proposed Rulemaking
OAW—Operation Allies Welcome
OMB—Office of Management and Budget
PHA—Public Housing Agency
PHE—Public Health Emergency
PRA—Paperwork Reduction Act
PRWORA—Personal Responsibility and Work Opportunity Reconciliation Act of 1996
RFA—Regulatory Flexibility Act of 1980
RFE—Request for Additional Evidence
RIA—Regulatory Impact Analysis
SIPP—Survey of Income and Program Participation
SNAP—Supplemental Nutrition Assistance Program
SSA—Social Security Administration
SSI—Supplemental Security Income
TANF—Temporary Assistance for Needy Families
TPS—Temporary Protected Status
UMRA—Unfunded Mandates Reform Act of 1995
USCIS—U.S. Citizenship and Immigration Services
USDA—U.S. Department of Agriculture
VAWA—Violence Against Women Act
WIC—Special Supplemental Nutrition Program for Women, Infants, and Children

I. Public Participation

DHS invites all interested parties to submit written data, views, comments, and arguments on all aspects of this NPRM. Comments must be submitted in English, or an English translation must be provided.

Instructions for comments: All submissions may be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and may include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *https://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *https://www.regulations.gov,* referencing DHS Docket No. USCIS–2021–0013. You may also sign up for email alerts on the online docket to be notified when comments are posted, or a final rule is published.

II. Executive Summary

DHS seeks to administer section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), in a manner that will be clear and comprehensible for officers as well as for noncitizens [1] and their families and will lead to fair and consistent adjudications, thereby mitigating the risk of unequal treatment of similarly situated individuals. DHS proposes to define the term ''likely at any time to become a public charge'' in regulation and to identify the types of public benefits that would be considered as part of the public charge inadmissibility determination. DHS also proposes to establish general principles regarding consideration of current and past receipt of public benefits in public charge inadmissibility determinations.

Additionally, DHS proposes the factors that DHS would consider in prospectively determining, under the totality of the circumstances framework, whether an applicant for admission or adjustment of status before DHS is inadmissible under the public charge ground. DHS proposes to amend existing information collections submitted with applications for adjustment of status to that of a lawful permanent resident to include questions relevant to the statutory minimum factors. DHS also proposes to require that all written denial decisions issued by USCIS to applicants reflect consideration of each of the statutory minimum factors, as well as the Affidavit of Support Under Section 213A of the INA where required, consistent with the standards set forth in the proposed rule, and specifically articulate the reasons for the officer's determination.

On August 14, 2019, DHS issued a different rule on the public charge ground of inadmissibility, which is no longer in effect.[2] The 2019 Final Rule expanded DHS's definition of ''public charge,'' and was associated with a heavy direct paperwork burden on applicants and adjudicators. The 2019 Final Rule was also associated with widespread indirect effects, primarily with respect to those who were not even subject to the public charge ground of inadmissibility, such as U.S. citizen children in mixed-status households. Notwithstanding these widespread indirect effects, during the time that the 2019 Final Rule was in place, of the 47,555 applications for adjustment of status to which the rule was applied, DHS issued only 3 denials (which were subsequently reopened and approved) and 2 Notices of Intent to Deny (which were ultimately rescinded, and the applications were approved) based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)–(B) of the INA, 8 U.S.C. 1182(a)(4)(A)–(B).

This proposed rule, if finalized, would implement a different policy than the 2019 Final Rule. As discussed at greater length below, DHS believes that, in contrast to the 2019 Final Rule, this proposed rule would effectuate a more faithful interpretation of the statutory concept of ''likely at any time to become a public charge''; avoid unnecessary burdens on applicants, adjudicators, and benefits-granting agencies; and mitigate the possibility of widespread ''chilling effects'' with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially by individuals who are not subject to the public charge ground of inadmissibility.

A. Major Provisions of the Regulatory Action

DHS proposes to include the following major changes:

- Amending 8 CFR 212.18, Application for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. This section clarifies that T nonimmigrants seeking adjustment of status are not subject to the public charge ground of inadmissibility.
- Adding 8 CFR 212.20, Applicability of public charge inadmissibility. This section identifies the categories of noncitizens who are subject to the public charge ground of inadmissibility.
- Adding 8 CFR 212.21, Definitions. This section establishes key regulatory definitions: Likely at any time to become a public charge, public cash assistance for income maintenance, long-term institutionalization at government expense, receipt (of public benefits), and government.
- Adding 8 CFR 212.22, Public charge inadmissibility determination. This section clarifies that evaluating the likelihood at any time of becoming a public charge is a prospective determination based on the totality of the circumstances. This section provides details on how the statutory minimum factors, as well as an Affidavit of Support Under Section 213A of the INA, if required, and current or past receipt of public benefits would be considered when making a public charge inadmissibility determination. This section also states that the fact that an applicant has a disability, as defined by section 504 of the Rehabilitation Act (Section 504), will not alone be a

[1] For purposes of this discussion, USCIS uses the term ''noncitizen'' colloquially to be synonymous with the term ''alien.''

[2] *See* 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction,* 84 FR 52357 (Oct. 2, 2019).

sufficient basis to determine whether the noncitizen is likely at any time to become a public charge. This section also includes categories of noncitizens whose past or current receipt of public benefits will not be considered in a public charge inadmissibility determination.

- Adding 8 CFR 212.23, Exemptions and waivers for public charge ground of inadmissibility. This section provides a list of statutory and regulatory exemptions from and waivers of the public charge ground of inadmissibility.
- Amending 8 CFR 245.23, Adjustment of aliens in T nonimmigrant classification. This section clarifies that T nonimmigrants seeking adjustment of status are not subject to the public charge ground of inadmissibility.

B. Summary of Legal Authority

The Secretary of Homeland Security's (Secretary) authority for the proposed regulatory amendments is found in section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), which governs public charge inadmissibility determinations; section 235 of the INA, 8 U.S.C. 1225, which addresses applicants for admission; and section 245 of the INA, 8 U.S.C. 1255, which addresses eligibility criteria for applications for adjustment of status. In addition, section 103(a)(3) of the INA, 8 U.S.C. 1103(a)(3), authorizes the Secretary to establish such regulations as the Secretary deems necessary for carrying out the Secretary's authority under the INA.

C. Summary of Costs and Benefits

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of the proposed rule, DHS considers the potential impacts of this proposed rule relative to two baselines. The No Action Baseline represents a state of the world under the 1999 Interim Field Guidance, which is the policy currently in effect. The second baseline is the Pre-Guidance Baseline, which represents a state of the world before the issuance of the 1999 Interim Field Guidance (*i.e.,* a state of the world in which the 1999 Interim Field Guidance did not exist). DHS also considers the potential effects of a regulatory alternative that is a rulemaking similar to the 2018 NPRM and the 2019 Final Rule (that is no longer in effect). As DHS noted in the 2019 Final Rule, those effects would primarily be experienced by persons who are not subject to the public charge ground of inadmissibility who might be disenrolled from public benefits or forgo enrollment in public benefits due to fear and confusion regarding the scope of the regulatory alternative. Further discussion of the regulatory alternative can be found in the ''Regulatory Alternative'' section.

Relative to the No Action Baseline, the primary source of quantified new direct costs for the proposed rule is the increase in the time required to complete Form I–485. DHS estimates that the proposed rule would impose additional new direct costs of approximately $12,871,511 annually to applicants filing Form I–485. In addition, the proposed rule would result in an annual savings for a subpopulation of affected individuals; T nonimmigrants applying for adjustment of status would no longer need to submit Form I–601 to seek a waiver of the public charge ground of inadmissibility. DHS estimates the total annual savings for this population would be $15,359. DHS estimates that the total annual net costs would be $12,856,152.[3]

Over the first 10 years of implementation, DHS estimates the total net costs of the proposed rule would be approximately $128,561,520 (undiscounted). In addition, DHS estimates that the 10-year discounted total net costs of this proposed rule would be about $109,665,584 at a 3-percent discount rate and about $90,296,232 at a 7-percent discount rate.

DHS expects the primary benefit of this proposed rule to be the qualitative benefit of establishing clear standards governing a determination that a noncitizen is inadmissible based on the public charge ground.

Tables 1 and 2 provide a more detailed summary of the proposed provisions and their impacts relative to the No Action Baseline and Pre-Guidance Baseline, respectively.

BILLING CODE 9111–97–P

[3] Calculations: Total annual net costs ($12,856,152) = Total annual costs ($12,871,511) − Total annual savings ($15,359)

Table 1. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the No Action Baseline)

Provision	Purpose	Expected Impact of Proposed Rule
Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	

Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. **Transfer Payments**: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.

Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

Table 2. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the Pre-Guidance Baseline)

Provision	Purpose	Expected Impact of Proposed Rule
Revising 8 CFR 212.18. Application for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including “likely at any time to become a public charge,” “receipt (of public benefits),” “public cash assistance for income maintenance,” “long-term institutionalization at government expense,” and “government.”	

Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. **Transfer Payments**: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.

Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking. • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

BILLING CODE 9111–97–C

III. Background

A. Legal Authority

The Secretary's authority for issuing this proposed rule is found in various sections of the Immigration and Nationality Act (INA, 8 U.S.C. 1101 *et seq.*), and the Homeland Security Act of 2002 (HSA).[4]

Section 102 of the HSA, 6 U.S.C. 112, and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration laws of the United States. Section 101 of the HSA, 6 U.S.C. 111, establishes that part of DHS's primary mission is to ensure that efforts, activities, and programs aimed at securing the homeland do not diminish either the overall economic security of the United States or the civil rights and civil liberties of persons.

In addition to establishing the Secretary's general authority for the administration and enforcement of immigration laws, section 103 of the INA, 8 U.S.C. 1103, enumerates various related authorities, including the Secretary's authority to establish such regulations, prescribe such forms of bond, issue such instructions, and perform such other acts as the Secretary deems necessary for carrying out such authority.

Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), provides that an applicant for a visa, admission, or adjustment of status is inadmissible if they are likely at any time to become a public charge.

In general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United

[4] *See* Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* (Nov. 25, 2002).

States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.[5]

Section 235 of the INA, 8 U.S.C. 1225, addresses the inspection of applicants for admission, including inadmissibility determinations of such applicants.

Section 245 of the INA, 8 U.S.C. 1255, generally establishes eligibility criteria for adjustment of status to that of a lawful permanent resident.

B. Grounds of Inadmissibility Generally

The United States has a long history of permitting noncitizens to enter the United States, whether permanently or on a temporary basis. At the same time, Congress has sought to exclude noncitizens who pose a threat to the safety or general welfare of the country or who seek to violate immigration laws.[6]

Congress has exercised this authority in part by establishing the concepts of admission[7] and inadmissibility in the INA.[8] Noncitizens may be inadmissible due to a range of acts, conditions, and conduct.[9] If a noncitizen is inadmissible as described in section 212(a) of the INA, 8 U.S.C. 1182(a), that noncitizen is ineligible to be admitted to the United States and ineligible to receive a visa. Congress has extended the applicability of the inadmissibility grounds beyond the context of applications for admission and visas by making admissibility an eligibility requirement for certain immigration benefits.[10] If a noncitizen is inadmissible, that noncitizen is also ineligible for those benefits unless the noncitizen is eligible to apply for and is granted a discretionary waiver of inadmissibility or other form of relief to overcome the inadmissibility, where available and appropriate.[11]

[5] *See* INA sec. 213, 8 U.S.C. 1183.

[6] *See Fiallo* v. *Bell,* 430 U.S. 787, 787 (1977) (The Supreme Court has ''long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'').

[7] Admission is defined as ''the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.'' *See* INA sec. 101(a)(13)(A), 8 U.S.C. 1101(a)(13)(A).

[8] INA sec. 212(a), 8 U.S.C. 1182(a).

[9] *Ibid.*

[10] For example, adjustment of status. *See* INA sec. 245(a)(2), 8 U.S.C. 1255(a)(2).

[11] *See, e.g.,* INA sec. 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), INA sec. 212(h), 8 U.S.C. 1182(h), INA sec. 212(i), 8 U.S.C. 1182(i); INA sec. 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii); *see also* USCIS Policy Manual, Volume 9—Waivers, *https://www.uscis.gov/policy-manual/volume-9.*

C. The Public Charge Ground of Inadmissibility

Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), provides that an applicant for a visa, admission, or adjustment of status is inadmissible if they are likely at any time to become a public charge. The public charge ground of inadmissibility, therefore, applies to individuals applying for a visa to come to the United States temporarily or permanently, for admission, or for adjustment of status to that of a lawful permanent resident.[12] By statute, some categories of noncitizens are exempt from the public charge inadmissibility ground, while others may apply for a waiver of the public charge inadmissibility ground.[13]

The INA does not define the term ''public charge.'' It does, however, specify that when determining whether a noncitizen is likely at any time to become a public charge, consular officers and immigration officers must, at a minimum, consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.[14] Additionally, section 212(a)(4)(B)(ii) of the INA, 8 U.S.C. 1182(a)(4)(B)(ii), permits the consular officer or the immigration officer to consider any Affidavit of Support Under Section 213A of the INA, 8 U.S.C. 1183a, submitted on the applicant's behalf, when determining whether the applicant is likely at any time to become a public charge.[15] In fact, with very limited exceptions, most noncitizens seeking family-based immigrant visas and adjustment of status, and some noncitizens seeking employment-based immigrant visas or adjustment of status, must submit a sufficient Affidavit of Support Under Section 213A of the INA in order to avoid being found inadmissible as likely at any time to become a public charge.[16]

In general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.[17]

[12] *See* INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

[13] *See* INA sec. 245(j). *See* 8 CFR 245.11. *See* INA sec. 245(d)(2)(B). *See* INA sec. 212(d)(3)(A).

[14] *See* INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

[15] *See* INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii). When required, the applicant must submit an Affidavit of Support Under Section 213A of the INA (Form I–864 or Form I–864EZ).

[16] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

[17] *See* INA sec. 213, 8 U.S.C. 1183.

1. Public Charge Statutes and Case Law, Pre-IIRIRA

Since at least 1882, the United States has denied admission to noncitizens on public charge grounds.[18] The INA of 1952 excluded noncitizens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the government at the time of application for admission, were likely at any time to become public charges.[19] The government has long interpreted the words ''in the opinion of'' as evincing the subjective nature of the determination.[20] The determination is also necessarily subjective to some degree due to its prospective nature.

A series of administrative decisions after the passage of the INA of 1952 clarified that a totality of the circumstances review was the proper framework for making public charge determinations and that receipt of public benefits would not, alone, lead to a finding of likelihood of becoming a public charge. In *Matter of Martinez-Lopez,* the Attorney General opined that the statute ''require[d] more than a showing of a possibility that the alien will require public support. Some *specific* circumstance, such as mental or physical disability, advanced age, or other fact showing that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the

[18] *See* Immigration Act of 1882, ch. 376, secs. 1–2, 22 Stat. 214, 214. Section 11 of the Act also provided that a noncitizen who became a public charge within 1 year of arrival in the United States from causes that existed prior to their landing was deemed to be in violation of law and was to be returned at the expense of the person or persons, vessel, transportation, company, or corporation who brought the noncitizen into the United States. *See also, e.g.,* Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, 34 Stat. 898, 899; Immigration Act of 1917, ch. 29, sec. 3, 39 Stat. 874, 876; INA of 1952, ch. 477, sec. 212(a)(15), 66 Stat. 163, 183; Illegal Immigration Reform and Immigrant Responsibility Act, Public Law 104–208, sec. 531(a), 110 Stat. 3009–546, 3009–674–75 (1996); Violence Against Women Reauthorization Act of 2013, Public Law 113–4, 127 Stat. 54.

[19] *See* INA of 1952, ch. 477, sec. 212(a)(15), 66 Stat. 163, 183.

[20] *See Matter of Harutunian,* 14 I&N Dec. 583, 588 (Reg'l Cmm'r 1974) (''[T]he determination of whether an alien falls into that category [as likely to become a public charge] rests within the discretion of the consular officers or the Commissioner . . . Congress inserted the words 'in the opinion of' (the consul or the Attorney General) with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review.'' (citation omitted)); *see also Matter of Martinez-Lopez,* 10 I&N Dec. 409, 421 (Att'y Gen. 1962) (''[U]nder the statutory language the question for visa purposes seems to depend entirely on the consular officer's subjective opinion.'').

United States who have indicated their ability and willingness to come to his assistance in case of emergency.'' [21] In *Matter of Perez,* the Board of Immigration Appeals (BIA) held that

[t]he determination of whether an alien is likely to become a public charge . . . is a prediction based upon the totality of the alien's circumstances at the time he or she applies for an immigrant visa or admission to the United States. The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.[22]

As stated in *Matter of Harutunian,* public charge determinations should take into consideration factors such as a noncitizen's age, incapability of earning a livelihood, a lack of sufficient funds for self-support, and a lack of persons in this country willing and able to assure that the noncitizen will not need public support.[23]

The totality of the circumstances framework for public charge inadmissibility determinations was codified in relation to one specific class of noncitizens in the 1980s. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), providing eligibility for adjustment of status to that of a lawful permanent resident to certain noncitizens who had resided in the United States continuously prior to January 1, 1982.[24] No changes were made to the language of the public charge exclusion ground under former section 212(a)(15) of the INA, 8 U.S.C. 1182(a)(15), but IRCA contained special public charge rules for noncitizens seeking legalization under section 245A of the INA, 8 U.S.C. 1255a. Although IRCA provided otherwise eligible noncitizens an exemption or waiver for some grounds of excludability, the noncitizens generally remained subject to the public charge ground of exclusion.[25] Under IRCA, however, if an applicant demonstrated a history of self-support through employment and without receiving public cash assistance, they would not be ineligible for adjustment of status based on being inadmissible on the public charge ground.[26] In addition, IRCA contained a discretionary waiver of public charge inadmissibility for noncitizens who were ''aged, blind or disabled'' as defined in section 1614(a)(1) of the Social Security Act who applied for lawful permanent resident status under IRCA and were determined to be inadmissible based on the public charge ground.[27]

The former Immigration and Naturalization Service (INS) promulgated 8 CFR 245a.3,[28] which established that immigration officers would make public charge inadmissibility determinations by examining the ''totality of the alien's circumstances at the time of his or her application for legalization.'' [29] According to the regulation, the existence or absence of a particular factor could never be the sole criterion for determining whether a person is likely to become a public charge.[30] Further, the regulation provided that the determination is a ''prospective evaluation based on the alien's age, health, income, and vocation.'' [31]

A special provision in the rule stated that noncitizens with incomes below the poverty level are not excludable if they are consistently employed and show the ability to support themselves.[32] Finally, a noncitizen's past receipt of public cash assistance would be a significant factor in a context that also considers the noncitizen's consistent past employment.[33] In *Matter of A-,* INS again pursued a totality of the circumstances approach in public charge determinations for applicants for legalization.[34] ''Even though the test is prospective,'' INS ''considered evidence of receipt of prior public assistance as a factor in making public charge determinations.'' [35] INS also considered a noncitizen's work history, age, capacity to earn a living, health, family situation, affidavits of support, and other relevant factors in their totality.[36]

The administrative practices surrounding public charge inadmissibility determinations began to crystalize into legislative changes in the 1990s. The Immigration Act of 1990 reorganized section 212(a) of the INA, 8 U.S.C. 1182(a), and redesignated the public charge provision as section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).[37] In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) [38] added to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the mandatory statutory factors and the enforceable affidavit of support.[39] Also in 1996, in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which is commonly known as the 1996 welfare reform law, Congress stated that noncitizens generally should not depend on public resources and that the availability of public benefits should not constitute an incentive for immigration to the United States.[40]

2. Public Benefits Under PRWORA

PRWORA significantly restricted noncitizens' eligibility for many Federal, State, and local public benefits.[41] When Congress enacted PRWORA, it set forth a self-sufficiency policy statement that noncitizens should be able to financially support themselves with their own resources or by relying on the aid of family members, sponsors, and private organizations, without depending on government assistance.[42] Although not defined in PRWORA, in context, self-sufficiency is tied to a noncitizen's ability to meet their needs without depending on public resources.[43]

PRWORA defines the term ''Federal public benefit'' [44] and provides that an ''alien'' who is not a ''qualified alien'' is ineligible for any such benefits,[45] subject to certain exceptions.[46] Among the exceptions established by Congress allowing for eligibility for all noncitizens, are provision of medical assistance for the treatment of an emergency medical condition; short term, in-kind, non-cash emergency disaster relief; and public health assistance related to immunizations and treatment of the symptoms of a

[21] 10 I&N Dec. 409, 421–23 (BIA 1962; Att'y Gen. 1964) (emphasis added). DHS discusses *Matter of Martinez-Lopez,* and consideration of disability, at greater length elsewhere in this preamble.

[22] 15 I&N Dec. 136, 137 (BIA 1974).

[23] 14 I&N Dec. 583, 589 (Reg'l Comm'r 1974).

[24] *See* IRCA of 1986, Public Law 99–603, sec. 201, 100 Stat. 3359, 3394.

[25] *See* INA sec. 245A(d)(2)(B)(ii)(IV), 8 U.S.C. 1255a(d)(2)(B)(ii)(IV).

[26] *See* INA sec. 245A(d)(2)(B)(iii), 8 U.S.C. 1255a(d)(2)(B)(iii).

[27] *See* INA sec. 245A(d)(2)(B)(ii), 8 U.S.C. 1255a(d)(2)(B)(ii); *see also* 42 U.S.C. 1382c(a)(1). This discretionary waiver applies only to IRCA legalization and not to adjustment of status under INA sec. 245(a), 8 U.S.C. 1255(a).

[28] *See Adjustment of Status for Certain Aliens,* 54 FR 29442 (Jul. 12, 1989). This regulation does not apply to adjustment of status under section 245(a) of the INA, 8 U.S.C. 1255, or to applications for admission with CBP. It is limited to adjustment from temporary to permanent resident status under the legalization provisions of IRCA. DHS does not propose amending 8 CFR 245a.3.

[29] *See* 8 CFR 245a.3(g)(4)(i).

[30] *Ibid.*

[31] *Ibid.*

[32] *See* 8 CFR 245a.3(g)(4)(iii).

[33] *Ibid.*

[34] 19 I&N Dec. 867 (Comm'r 1988).

[35] *Ibid.*

[36] *See* 19 I&N Dec. 867, 869 (Comm'r 1988).

[37] *See* Immigration Act of 1990, Public Law 101–649, sec. 601(a), 104 Stat. 4978, 5072. In 1990, Congress reorganized INA sec. 212(a), redesignating the public charge provision as INA sec. 212(a)(4).

[38] Public Law 104–208, div. C, 110 Stat 3009–546.

[39] Public Law 104–208, div. C, 110 Stat 3009–546.

[40] *See* Public Law 104–193, section 400, 110 Stat. 2105, 2260 (codified at 8 U.S.C. 1601).

[41] 8 U.S.C. 1601–1646.

[42] 8 U.S.C. 1601(2).

[43] *Ibid.*

[44] 8 U.S.C. 1611(c).

[45] 8 U.S.C. 1611(a).

[46] 8 U.S.C. 1611(b).

communicable disease.[47] The exceptions were further clarified by the Department of Justice (DOJ) and some of the agencies that administer these public benefits. On January 16, 2001, the DOJ published a notice of final order, ''Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,'' [48] which indicated that PRWORA does not preclude noncitizens from receiving certain other widely available programs, services, or assistance as well as certain benefits and services for the protection of life and safety.

PRWORA further identified three types of benefits and related eligibility rules. First, there are ''specified Federal programs,'' for which even ''qualified aliens'' are generally not eligible.[49] Second, there are ''Federal means-tested public benefits,'' for which ''qualified aliens'' are generally eligible after a 5-year waiting period.[50] And finally, there are ''designated federal programs,'' for which States are allowed to determine whether and when a ''qualified alien'' is eligible, subject to certain restrictions.[51]

Subsequent legislation has added additional categories of noncitizens, many with humanitarian statuses, to PRWORA's various exceptions and special provisions in order to meet the needs of those vulnerable populations. DHS also discusses these statuses and modifications to PRWORA in the section below.

The following is a list of immigration categories that are ''qualified aliens'' under PRWORA. As noted above, subject to certain exceptions, ''qualified aliens'' are generally eligible for Federal public benefits after 5 years. As indicated in the section of this preamble on ''Exemptions and Waivers'' below, most categories of ''qualified aliens'' are not subject to the public charge ground of inadmissibility.

- An alien who is lawfully admitted for permanent residence under the INA.[52]
- An alien who is granted asylum under section 208 of the INA.[53]
- A refugee who is admitted to the United States under section 207 of the INA.[54]
- An alien who is paroled into the United States under section 212(d)(5) of the INA for a period of at least 1 year.[55]
- An alien whose deportation is being withheld under section 243(h) [56] of the INA or section 241(b)(3) of the INA, as amended.[57]
- An alien who is granted conditional entry under section 203(a)(7) of the INA as in effect before April 1, 1980.[58]
- An alien who is a Cuban and Haitian entrant as defined in section 501(e) of the Refugee Education Assistance Act of 1980.[59]
- An individual who lawfully resides in the United States in accordance with the Compacts of Free Association between the Government of the United States and the Governments of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau referred to in 8 U.S.C. 1612(b)(2)(G) (but only with respect to Medicaid).[60]
- An alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided, and the alien has been approved or has a petition pending that sets forth a prima facie case for status under section 204(a)(1)(A)(i)–(iv), or classification pursuant to section 204(a)(1)(B)(i)–(iii) of the INA, or suspension of deportation under section 244(a)(3) of the INA, or cancellation of removal pursuant to INA sec. 240A(b)(2).[61]
- An alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without active participation by the alien in such battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced to such battery or cruelty (and the alien did not actively participate in such battery or cruelty), but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided, and the alien has been approved or has a petition pending which sets forth a prima facie case for status under section 204(a)(1)(A)(i)–(iv), or classification pursuant to section 204(a)(1)(B)(i)–(iii) of the INA, or suspension of deportation under section 244(a)(3) of the INA, or cancellation of removal pursuant to INA section 240A(b)(2).[62]
- An alien child who resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent's spouse or by a member of the spouse's family residing in the same household as the parent, and the spouse consented to, or acquiesced to such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided, and the alien has been approved or has a petition pending which sets forth a prima facie case for status under section 204(a)(1)(A)(i)–(iv), or classification pursuant to section 204(a)(1)(B)(i)–(iii) of the INA, or suspension of deportation under section 244(a)(3) of the INA, or cancellation of removal pursuant to INA section 240A(b)(2).[63]
- An alien who has been granted nonimmigrant status under section 101(a)(15)(T) of the INA or who has a pending application that sets forth a prima facie case for eligibility for such nonimmigrant status.[64]

There are additional categories of noncitizens who may be eligible for certain benefits notwithstanding limitations set under PRWORA. For instance, the following noncitizens are treated as though they are refugees for benefits eligibility purposes, under other provisions of law:

- An alien who is a victim of a severe form of trafficking in persons, or an

[47] *See* 8 U.S.C. 1611(b)(1). *See Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,* 66 FR 3613 (Jan. 16, 2001); *see also Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,* 62 FR 61344 (Nov. 17, 1997).

[48] *See Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,* 66 FR 3613 (Jan. 16, 2001); *see also Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,* 61 FR 45985 (Aug. 30, 1996).

[49] 8 U.S.C. 1612(a).

[50] 8 U.S.C. 1613(a).

[51] 8 U.S.C. 1612(b).

[52] 8 U.S.C. 1641(b)(1).

[53] 8 U.S.C. 1641(b)(2).

[54] 8 U.S.C. 1641(b)(3).

[55] 8 U.S.C. 1641(b)(4). Noncitizens who have been paroled have not been admitted. *See* INA sec. 101(a)(13)(B), 8 U.S.C. 1101(a)(13)(B); *see also* INA sec. 212(d)(5), 8 U.S.C. 1182(d)(5).

[56] As in effect immediately before the effective date of section 307 of division C of Public Law 104–208, 110 Stat. 3009–546.

[57] 8 U.S.C. 1641(b)(5).

[58] 8 U.S.C. 1641(b)(6).

[59] 8 U.S.C. 1641(b)(7).

[60] 8 U.S.C. 1641(b)(8).

[61] 8 U.S.C. 1641(c)(1).

[62] 8 U.S.C. 1641(c)(2).

[63] 8 U.S.C. 1641(c)(3).

[64] 8 U.S.C. 1641(c)(4).

alien classified as a nonimmigrant under 8 U.S.C. 1101(a)(15)(T)(ii).[65]

- An Iraqi or Afghan alien granted special immigrant status under section 8 U.S.C. 101(a)(27).[66]
- A citizen or national of Afghanistan (or a person with no nationality who last habitually resided in Afghanistan) paroled into the United States after July 31, 2021, who meets certain requirements, until March 31, 2023, or the term of parole granted, whichever is later.[67]

In addition, in the Medicaid context, States may also elect to provide medical assistance under Title XIX of the Social Security Act to cover all lawfully residing children under age 21 or pregnant individuals.[68]

Under PRWORA, States may enact their own legislation to provide State and local public benefits to certain noncitizens not lawfully present in the United States.[69] Some States and localities have funded public benefits for some noncitizens who may not be eligible for Federal public benefits.[70]

While PRWORA allows certain noncitizens to receive certain public benefits (*e.g.,* Medicaid limited to treatment of an emergency medical condition (all noncitizens); [71] Supplemental Nutrition Assistance Program (SNAP) (''qualified alien'' children under 18)), Congress, except in very limited circumstances,[72] did not prohibit DHS from considering the receipt of such benefits in a public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), or direct DHS to do so.

The following table presents a list of the major categories of noncitizens eligible for SSI, TANF, or Medicaid who would be subject to a public charge inadmissibility determination were they later to apply for adjustment of status or admission to the United States, unless another statutory exemption applies that is particular to their individual circumstances.[73] The table is provided for background purposes only and should not be used to determine benefits eligibility.

BILLING CODE 9111–97–P

[65] 22 U.S.C. 7105(b)(1)(A).

[66] Public Law 111–118, Div. A., Tit. VIII., sec. 8120, 123 Stat. 3409, 3457 (2009).

[67] Public Law 117–43, sec. 2502(b) (Sept. 30, 2021).

[68] *See* sections 1903(v)(4) of the Social Security Act (42 U.S.C. 1396b(v)(4)).

[69] *See* 8 U.S.C. 1621(d).

[70] *See, e.g.,* U.S. Dep't of Health & Human Servs. (HHS), Office of the Assistant Sec'y for Planning & Evaluation, *Overview of Immigrants Eligible for SNAP, TANF, Medicaid and CHIP* (Mar. 27, 2012), available at *http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Eligibility/ib.shtml.*

[71] *See* 8 U.S.C. 1611(b)(1)(A).

[72] *See* INA sec. 212(s), 8 U.S.C. 1182(s).

[73] A list of statutory exemptions to the public charge ground of inadmissibility can be found in the Applicability section of this preamble and in proposed 8 CFR 212.23.

Table 3. Categories of noncitizens eligible for SSI, TANF, or Medicaid for long-term institutionalization whose past or current benefit use may be considered in a public charge inadmissibility determination		
Population	**Eligible for which benefits?**	**Notes**
Noncitizens who were paroled into the United States for more than one year	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1] Medicaid and TANF eligibility subject to 5-year waiting period in most cases.
Noncitizens granted withholding of removal who are allowed to remain in the United States	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1]
Certain citizens of Micronesia, the Marshall Islands, or Palau, who can lawfully reside and work in the United States under the Compacts of Free Association	Medicaid for long-term institutionalization	
Cuban and Haitian Entrants under section 501(e) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note)	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1] Not subject to the public charge inadmissibility ground if also in an exempt immigration status.[2]
Lawfully present children, pregnant women, and women in the 60-day postpartum period or 12-month postpartum period (depending on the State's election), in States that have elected to cover this population in Medicaid	Medicaid for long-term institutionalization	Not subject to the public charge inadmissibility ground if also in an exempt immigration status.[2]

Noncitizen members of federally recognized Indian tribes	SSI, Medicaid for long-term institutionalization	Not subject to the public charge inadmissibility ground if also in an exempt immigration status.[2]
Conditional entrants under section 203(a)(7) of the INA as in effect before April 1, 1980	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1]
Returning lawful permanent residents (LPRs) who are seeking admission to the United States as described in section 101(a)(13)(C) of the INA (8 U.S.C. 1101(a)(13)(C)), including those absent from the United States for more than 180 days	SSI, TANF, Medicaid for long-term institutionalization	Not all LPRs are eligible for SSI, TANF, and Medicaid, depending on factors such as whether the State requires LPRs to have 40 qualified work quarters and whether subject to the 5-year waiting period.

Notes

[1] *See* Social Security Administration, Supplemental Security Income for Noncitizens, *https://www.ssa.gov/pubs/EN-05-11051.pdf* (accessed Feb. 9, 2022).
[2] *See* proposed 8 CFR 212.23.

BILLING CODE 9111–97–C

DHS welcomes comments on the table, including proposed clarifications or corrections, and may update the table as appropriate in the preamble to a final rule.

3. Changes Under IIRIRA

Congress, in IIRIRA,[74] codified in the public charge inadmissibility statute the following minimum factors that must be considered when making public charge inadmissibility determinations: [75]

- Age;
- Health;
- Family status;
- Assets, resources, and financial status; and
- Education and skills.[76]

Section 531(a) of IIRIRA amended section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), to require an enforceable affidavit of support under newly added section 213A of the INA, 8 U.S.C. 1183a,[77] for certain noncitizens to avoid a finding of inadmissibility under that section.[78] The law required submission of an Affidavit of Support Under Section 213A of the INA for most family-based immigrants and certain employment-based immigrants and provided that these noncitizens are inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), unless a sufficient affidavit is filed on their behalf.[79] Congress also permitted, but did not require, consular and immigration officers to consider the Affidavit of Support Under Section 213A of the INA as a factor in the public charge inadmissibility determination.[80] In the House Conference Report on IIRIRA, the committee indicated that the amendments to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), were designed to ‘‘expand’’ the public charge ground of inadmissibility by requiring DHS to find inadmissible those who lack a sponsor willing to support them.[81]

DHS may appropriately consider the policy goals articulated in PRWORA and IIRIRA when administratively implementing the public charge ground of inadmissibility, and may also consider other important goals including, but not limited to, clarity, fairness, and administrability. DHS acknowledges the potential tension between the availability of public benefits to some noncitizens as set forth in PRWORA and statutory provisions that deny visa issuance, admission, and adjustment of status to noncitizens who are likely to become a public charge. Congress, in enacting PRWORA and IIRIRA very close in time, made certain public benefits available to a small number of noncitizens who are also subject to the public charge ground of inadmissibility, even though receipt of some such benefits could influence a determination of whether the noncitizen is inadmissible as likely at any time to become a public charge.

Under the statute crafted by Congress, noncitizens generally would not be issued visas, admitted to the United States, or permitted to adjust status if they are likely at any time to become a public charge. Congress nonetheless recognized that certain noncitizens present in the United States who are subject to the public charge ground of inadmissibility might reasonably find themselves in need of public benefits that, if obtained, could influence a determination of whether they are inadmissible as likely at any time to become a public charge. Consequently, in PRWORA, Congress allowed certain noncitizens to be eligible for some

[74] Public Law 104–208, div. C, 110 Stat 3009–546 (1996).

[75] *See* Public Law 104–208, div. C, sec. 531, 110 Stat. 3009–546, 3009–674 (1996) (amending INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4)).

[76] *See* INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

[77] Section 551 of IIRIRA created INA sec. 213A, 8 U.S.C. 1183a, and specified the requirements for a sponsor's affidavit, including making it enforceable. *See* INA sec. 213A, 8 U.S.C. 1183a; sec. 551 of IIRIRA, Public Law 104–208, 110 Stat. 3009 (1996).

[78] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D). *See* INA sec. 213A, 8 U.S.C. 1183a.

[79] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

[80] *See* INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

[81] *See* H.R. Rep. No. 104–828, at 240–41 (1996) (Conf. Rep.); *see also* H.R. Rep. No. 104–469(I), at 143–45 (1996).

public benefits even though they may later seek a visa, admission, or adjustment of status and thereby be subject to the public charge ground of inadmissibility. However, Congress, except in very limited circumstances,[82] did not prohibit DHS from considering the receipt of such benefits in a public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). In other words, although a noncitizen may obtain public benefits for which they are eligible, the receipt of those benefits may be considered for public charge inadmissibility determination purposes.

4. INS 1999 Notice of Proposed Rulemaking and Interim Field Guidance

On May 26, 1999, INS issued a proposed rule, Inadmissibility and Deportability on Public Charge Grounds [83] (1999 NPRM), and on that same day issued interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (1999 Interim Field Guidance).[84]

In the 1999 proposed rule, INS proposed to ''alleviate growing public confusion over the meaning of the currently undefined term 'public charge' in immigration law and its relationship to the receipt of Federal, State, or local public benefits.'' [85] INS sought to reduce negative public health and nutrition consequences generated by that confusion and to provide noncitizens, their sponsors, health care and immigrant assistance organizations, and the public with better guidance as to the types of public benefits that INS considered relevant to the public charge determination.[86] INS also sought to address the public's concerns about immigrants' fears of accepting public benefits for which they remained eligible, specifically in regards to medical care, children's immunizations, basic nutrition, and treatment of medical conditions that may jeopardize public health.[87]

When developing the proposed rule, INS consulted with Federal benefit-granting agencies such as the U.S. Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA). The Deputy Secretary of HHS, whose Department administers Temporary Assistance for Needy Families (TANF), Medicaid, the Children's Health Insurance Program (CHIP), and other benefits, advised that the best evidence of whether an individual is relying primarily on the government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at government expense.[88] The Deputy Commissioner for Disability and Income Security Programs at SSA agreed that the receipt of Supplemental Security Income (SSI) ''could show primary dependence on the government for subsistence fitting the INS definition of public charge.'' [89] Furthermore, the USDA's Under Secretary for Food, Nutrition and Consumer Services advised that ''neither the receipt of food stamps nor nutrition assistance provided under the Special Nutrition Programs administered by USDA should be considered in making a public charge determination.'' [90] While these letters supported the approach taken in the 1999 proposed rule and Interim Field Guidance, the letters specifically focused on the reasonableness of a given INS interpretation (*i.e.,* primary dependence on the government for subsistence). The letters did not foreclose the agency from adopting a different definition consistent with statutory authority.

INS defined public charge in the 1999 proposed rule, as well as in the 1999 Interim Field Guidance, to mean, for purposes of admission and adjustment of status, ''an alien who is likely to become . . . primarily dependent [91] on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'' [92] The 1999 proposed rule provided that non-cash benefits, as well as ''supplemental, special-purpose cash benefits should not be considered'' for public charge purposes, in light of INS's decision to define public charge by reference to primary dependence on public benefits.[93] Ultimately, however, INS did not publish a final rule conclusively addressing these issues.

The 1999 Interim Field Guidance was issued as an attachment to the 1999 proposed rule in order to ''provide additional information to the public on the Service's implementation of the public charge provisions of the immigration laws . . . in light of the recent changes in law.'' [94] The 1999 Interim Field Guidance explained how the agency would determine if a person is likely to become a public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a), for admission and adjustment of status purposes, and whether a person is deportable as a public charge under section 237(a)(5) of the INA, 8 U.S.C. 1227(a)(5).[95] The 1999 Interim Field Guidance also was intended to stem the fears that were causing noncitizens to refuse certain supplemental public benefits, such as transportation vouchers and childcare assistance, that were intended to help recipients become better able to obtain and retain employment and establish self-sufficiency.[96]

The Department of State (DOS) also issued a cable to its consular officers at that time implementing similar guidance for visa adjudications, and its Foreign Affairs Manual (FAM) was similarly updated.[97] Until both agencies published new regulations and policy guidance, including changes to the FAM, in 2018 and 2019, USCIS had continued to follow the 1999 Interim Field Guidance in its adjudications, and DOS had continued following the public charge guidance set forth in the FAM in 1999.[98]

5. DHS Inadmissibility on Public Charge Grounds Notice of Proposed Rulemaking and 2019 Final Rule

In August 2019, DHS issued a final rule, Inadmissibility on Public Charge Grounds (2019 Final Rule). The 2019 Final Rule (that is no longer in effect), changed DHS's public charge standards and procedures.[99] The 2019 Final Rule redefined the term public charge to mean ''an alien who receives one or more public benefits, as defined in [the 2019 Final Rule], for more than 12

[82] *See* INA sec. 212(s), 8 U.S.C. 1182(s).

[83] 64 FR 28676 (May 26, 1999).

[84] 64 FR 28689 (May 26, 1999). Due to a printing error, the **Federal Register** version of the 1999 Interim Field Guidance appears to be dated ''March 26, 1999,'' even though the guidance was actually signed May 20, 1999; became effective May 21, 1999; and was published in the **Federal Register** on May 26, 1999, along with the NPRM.

[85] *See* 64 FR 28676, 28676 (May 26, 1999).

[86] *See* 64 FR 28676, 28676–77 (May 26, 1999).

[87] *See* 64 FR 28676, 28676 (May 26, 1999).

[88] *See* 64 FR 28676, 28686–87 (May 26, 1999).

[89] *See* 64 FR 28676, 28687 (May 26, 1999).

[90] *See* 64 FR 28676, 28688 (May 26, 1999).

[91] Former INS defined ''primarily dependent'' as ''the majority'' or ''more than 50 percent.''

[92] *See* 64 FR 28676, 28681 (May 26, 1999); 64 FR 28689 (May 26, 1999). The proposed rule also defined public charge to mean, ''for purposes of removal as a deportable alien means an alien who has become primarily dependent on the Government for subsistence as demonstrated by either: (i) The receipt of public cash assistance for income maintenance purposes, or (ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime).'' 64 FR 28676, 28684 (May 26, 1999).

[93] *See* 64 FR 28676, 28692–93 (May 26, 1999).

[94] *See* 64 FR 28689, 28689 (May 26, 1999).

[95] *See* 64 FR 28689, 28692–93 (May 26, 1999).

[96] *See* 64 FR 28689 (May 26, 1999).

[97] *See* 64 FR 28676, 28680 (May 26, 1999).

[98] *See* 9 FAM 302.8, *https://fam.state.gov/fam/09fam/09fam030208.html* (accessed Dec. 12, 2021).

[99] *See* 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction,* 84 FR 52357 (Oct. 2, 2019).

months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).'' [100] It also defined the term public benefit to include cash assistance for income maintenance (other than tax credits), SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.[101] DHS tailored the 2019 Final Rule to limit the rule's effects in certain ways, such as with respect to the consideration of public benefits received by active duty military members and their spouses and children, and consideration of public benefits received by children in certain contexts.[102]

The 2019 Final Rule also provided an evidentiary framework under which USCIS would determine public charge inadmissibility and explained how DHS would interpret the statutory minimum factors for determining whether ''in the opinion of'' [103] the officer, a noncitizen is likely at any time to become a public charge. Specifically, for adjustment of status applications before USCIS, DHS created a new Declaration of Self-Sufficiency, Form I–944, which collected information from applicants relevant to the 2019 Final Rule's approach to the statutory factors and other factors identified in the rule that would be considered in the totality of the circumstances.[104]

The 2019 Final Rule also contained a list of negative and positive factors that DHS would consider as part of this inadmissibility determination, and directed officers to consider these factors ''in the totality of the circumstances.'' [105] These positive or negative factors, as well as the ''heavily weighted'' positive and negative factors, operated as guidelines to help the officer determine whether the noncitizen was likely at any time to become a public charge.[106] In the 2019 Final Rule, DHS indicated that apart from a lack of an Affidavit of Support Under Section 213A of the INA, where required, the presence of a single positive or negative factor, or heavily weighted negative or positive factor, would never, on its own, create a presumption that an applicant was inadmissible as likely at any time to become a public charge or determine the outcome of the public charge inadmissibility determination.[107] Rather, a public charge inadmissibility determination would be based on the totality of the circumstances presented in an applicant's case.[108]

Additionally, the 2019 Final Rule added provisions that rendered certain nonimmigrants ineligible for extension of stay or change of status if they received one or more public benefits, as defined in the rule, for more than 12 months in the aggregate within any 36-month period since obtaining the nonimmigrant status they wished to extend or change.[109]

The 2019 Final Rule also revised DHS regulations governing the Secretary's discretion to accept a public charge bond under section 213 of the INA, 8 U.S.C. 1183, for those seeking adjustment of status.[110]

The 2019 Final Rule did not interpret or change DHS's implementation of the public charge ground of deportability.[111]

6. Litigation History and Vacatur of DHS 2019 Final Rule

The 2019 Final Rule was set to take effect on October 15, 2019, but, before it did, numerous Plaintiffs filed suits challenging the 2019 Final Rule in five district courts, across four circuits.[112] All five district courts preliminarily enjoined the 2019 Final Rule. Although differing in some particulars, all five concluded that the 2019 Final Rule's definition was contrary to the INA because the term ''public charge'' had a long-settled definition with which the 2019 Final Rule conflicted. Some courts also concluded that the 2019 Final Rule was likely arbitrary and capricious, and that the 2019 Final Rule likely violated the Rehabilitation Act.[113]

The cases took differing paths through the courts of appeals. The Ninth and Fourth Circuits granted the government's requests for stays pending appeal.[114] The Second and Seventh Circuits declined to grant stays; however, the Supreme Court subsequently granted stays in those cases, pending final resolution by the Court of the government's appeals.[115] The 2019 Final Rule was ultimately implemented on February 24, 2020.

On June 10, 2020, the Seventh Circuit affirmed the lower court's preliminary injunction.[116]

On July 29, 2020, the United States District Court for the Southern District of New York entered a second preliminary injunction prohibiting enforcement of the 2019 Final Rule nationwide during the pendency of the COVID–19 public-health emergency.[117] On August 12, 2020, the Second Circuit issued an order staying the second preliminary injunction outside of the States within the Second Circuit. Then, on September 11, 2020, the Second Circuit stayed the second preliminary injunction in its entirety.[118]

Meanwhile, on August 4, 2020, the Second Circuit issued a decision affirming the original Fall 2019 injunctions on appeal before that court.[119]

One day later, on August 5, 2020, the Fourth Circuit reversed the Maryland district court's injunction.[120] Plaintiffs filed a timely motion for en banc rehearing, and on December 3, 2020, the Fourth Circuit granted that motion. By ordering en banc rehearing, the Fourth Circuit vacated the prior panel decision.

On October 7, 2020, the government filed petitions for writ of certiorari in

[100] *See* 84 FR 41292 (Aug. 14, 2019).

[101] *Ibid.*

[102] *See* 84 FR 41292 (Aug. 14, 2019). For example, under that rule, public benefits did not include public benefits received by those who, at the time of receipt, filing the application for admission or adjustment of status, or adjudication, is enlisted in the U.S. Armed Forces, serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or the spouse of children of such service members. Also under that rule, public benefits did not include benefits received by children of U.S. citizens whose lawful admission for permanent residence would result in automatic acquisition of U.S. citizenship.

[103] *See* INA sec. 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A).

[104] The Declaration of Self-Sufficiency requirement only applied to adjustment applicants and not applicants for admission at a port of entry.

[105] *See* 84 FR 41292 (Aug. 14, 2019).

[106] *Ibid.*

[107] *Ibid.*

[108] *See* 84 FR 41292 (Aug. 14, 2019).

[109] *Ibid.*

[110] *Ibid.*

[111] *See* INA sec. 237(a)(5), 8 U.S.C. 1227(a)(5). *See* 84 FR 41292, 41295 (Aug. 14, 2019).

[112] *CASA de Maryland, Inc., et al.,* v. *Trump,* 19–cv–2715 (D. Md.); *City and County of San Francisco, et al.,* v. *DHS, et al.,* 19–cv–04717 (N.D. Ca.); *City of Gaithersburg, et al.* v. *Trump, et al.,* 19–cv–02851 (D. Md.); *Cook County et al.* v. *McAleenan et al.,* 19–cv–06334 (N.D. Ill.); *La Clinica De La Raza, et al.,* v. *Trump, et al.,*19–cv–4980 (N.D. Ca.); *Make the Road New York, et al.* v. *Cuccinelli, et al.,* 19–cv–07993 (S.D.N.Y.); *New York, et al.* v. *DHS, et al.,* 19–cv–07777 (S.D.N.Y.); *State of California, et al.,* v. *DHS, et al.,* 19–cv–04975 (N.D. Cal.); *State of Washington, et al.* v. *DHS, et al.,* 19–cv–05210 (E.D. Wa.).

[113] *Cook County.* v. *Wolf,* 962 F.3d 208, 228 (7th Cir. 2020).

[114] *See, City and County of San Francisco, et al.* v. *DHS,* 944 F.3d 773 (9th Cir. Dec. 5, 2019), *City and County of San Francisco, et al.* v. *DHS,* No. 19–17213 (9th Cir. Jan. 20, 2021); *CASA de Maryland, Inc. et al.* v. *Trump,* No. 19–2222 (4th Cir. Dec 9, 2019).

[115] *See DHS* v. *New York,* 140 S. Ct. 599 (2020); *Wolf* v. *Cook County,* 140 S. Ct. 681 (2020).

[116] *See Cook County* v. *Wolf,* 962 F.3d 208 (7th Cir. 2020) (then-Judge Barrett dissenting).

[117] *See New York* v. *DHS,* 475 F. Supp. 3d 208 (S.D.N.Y. 2020).

[118] *See New York* v. *DHS,* 974 F.3d 210 (2d Cir. 2020).

[119] *See New York* v. *Department of Homeland Security,* 969 F.3d 42 (2d Cir. 2020).

[120] *See CASA de Maryland* v. *Trump,* 971 F.3d 220 (4th Cir. 2020).

the Second and Seventh Circuit cases.[121] The government urged the Court to grant certiorari in the Second Circuit case, and to hold the Seventh Circuit case pending its resolution of the Second Circuit case.

On November 2, 2020, the United States District Court for the Northern District of Illinois entered a partial final judgment in favor of Plaintiffs in the Cook County case and vacated the 2019 Final Rule nationwide.[122] The Seventh Circuit stayed the judgment pending the Supreme Court's resolution of the government's certiorari petition in the preliminary injunction appeal.

On December 2, 2020, the Ninth Circuit affirmed preliminary injunctions entered by the U.S. district courts in California and Washington.[123]

On January 19, 2021, the government submitted a petition for writ of certiorari in the Ninth Circuit case, which asked the Court to hold the petition until it decided the New York case.[124]

On February 2, 2021, President Biden directed the Secretary, along with the Attorney General, the Secretary of State, and other relevant agency heads, to ''review all agency actions related to implementation of the public charge ground of inadmissibility . . . and the related ground of deportability.'' [125] The President ordered the agencies to complete that review within 60 days.[126]

On February 22, 2021, the Supreme Court granted the government's petition for writ of certiorari in *DHS* v. *New York,* No. 20–449, in order to review the preliminary injunctions issued in October 2019 by the United States District Court for the Southern District of New York.

Approximately 2 weeks later, DHS announced its determination that continuing to defend the 2019 Final Rule before the Supreme Court and in the lower courts would not be in the public interest or an efficient use of government resources. Consistent with that determination, the government filed stipulations with the Supreme Court dismissing *DHS* v. *New York,* No. 20–449; *Mayorkas* v. *Cook County,* No. 20–450; and *USCIS* v. *City & County of San Francisco,* No. 20–962.

The government likewise filed motions to dismiss public charge related appeals in the lower courts. The Seventh Circuit granted the government's motion and dismissed the appeal. As a consequence, the vacatur ordered by the United States District Court for the Northern District of Illinois became effective. The government subsequently published a notice in the **Federal Register** formally removing the 2019 Final Rule from the Code of Federal Regulations.[127]

On March 11, 2021, the United States Court of Appeals for the Fourth Circuit granted DHS's unopposed motion to dismiss the appeal and issued a mandate making the order dismissing the appeal effective. On the same day, a group of States filed motions in the Fourth and Seventh Circuits to intervene and recall the respective mandates. On March 15, 2021, the Seventh Circuit motion was denied. On March 18, 2021, the Fourth Circuit motion was denied.

On March 19, 2021, the same collection of States filed with the Supreme Court an application to intervene and to stay the vacatur judgment of the United States District Court for the Northern District of Illinois.[128] That application was denied on April 26, 2021.

On March 10, 2021, a different collection of States filed a motion to intervene in the Ninth Circuit case.[129] On April 8, 2021, that motion was denied.

On April 30, 2021, the same collection of States filed a motion for leave to intervene in the Supreme Court in order to pursue further review of the Ninth Circuit's judgment.[130] On June 1, 2021, the Court ordered that the matter be held in abeyance to permit the prospective intervenors an opportunity to file a petition for writ of certiorari from the denial of their motion to intervene in the United States Court of Appeals for the Ninth Circuit.

On June 18, 2021, the same collection of States filed a petition for writ of certiorari with the Supreme Court, in which the States presented three questions.[131]

On October 29, 2021, the Supreme Court granted the petition limited to the question of whether the States should be permitted to intervene.

7. Consideration of Chilling Effects

In this proposed rule, DHS gives more thorough consideration to the potential chilling effects of promulgating regulations governing the public charge inadmissibility determination. In considering such effects, DHS took into account the former INS's approach to chilling effects in the 1999 Interim Field Guidance and 1999 NPRM, the 2019 Final Rule's discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects following the 2019 Final Rule, and public comments on chilling effects following the August 2021 Advance Notice of Proposed Rulemaking (ANPRM).

a. Discussion of Chilling Effects in the 1999 NPRM and 1999 Interim Field Guidance

The 1999 NPRM and accompanying 1999 Interim Field Guidance specifically cited public confusion regarding the meaning of the statutorily undefined term ''public charge,'' and the potential negative public health consequences, as creating a need for urgent action to provide ''better guidance as to the types of public benefits that will and will not be considered in public charge determinations.'' [132] The 1999 NPRM explained that, following the enactment of PRWORA and its restrictions on the eligibility of certain noncitizens for many Federal, State, and local public benefits,

> numerous legal immigrants and other aliens are choosing not to apply for . . . benefits [for which Congress expressly made them eligible] because they fear the negative immigration consequences of potentially being deemed a 'public charge.' This tension between the immigration and welfare laws is exacerbated by the fact that 'public charge' has never been defined in statute or regulation. Without a clear definition of the term, noncitizens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.[133]

The INS went on to note that, according to Federal and State benefit-granting agencies,

> this growing confusion is creating significant, negative public health consequences across

[121] *See Department of Homeland Security* v. *New York,* No. 20–449 (S. Ct.); *Wolf* v. *Cook County,* No. 20–450 (S. Ct.).

[122] *See Cook County* v. *Wolf,* 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020).

[123] *See City & County of San Francisco* v. *USCIS,* 981 F.3d 742 (9th Cir. 2020).

[124] *See USCIS* v. *City & County of San Francisco,* No. 20–962 (S. Ct.). The petition was submitted on January 19, 2021, and docketed on January 21, 2021.

[125] *See* Exec. Order No. 14012, sec. 4, 86 FR 8277, 8278.

[126] *Ibid.*

[127] *See Inadmissibility on Public Charge Grounds; Implementation of Vacatur,* 86 FR 14221, 14221 (Mar. 15, 2021).

[128] *See Texas, et al.* v. *Cook County, Illinois, et al.,* 20A150.

[129] *See City and County of San Francisco, et al.,* v. *USCIS, et al.,* 19–17213.

[130] *See Arizona, et al.* v. *City and County of San Francisco, et al.,* 20M81.

[131] *See Arizona, et al.* v. *City and County of San Francisco, et al.,* 20–1775. The questions presented were: (1) Whether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend; (2) whether the rule is contrary to law or arbitrary and capricious; and (3) alternatively, whether the decision below as to the rule should be vacated as moot under *Munsingwear.*

[132] *See* 64 FR 28676 (May 26, 1999); 64 FR 28689 (May 26, 1999).

[133] 64 FR 28676 (May 26,1999).

the country. This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public. For example, infectious diseases may spread as the numbers of immigrants who decline immunization services increase.[134]

For these reasons, and following on-the-record consultation with HHS, USDA, and SSA, as well as consideration of the historical understandings of the term ''public charge,'' the INS proposed (and in the 1999 Interim Field Guidance, implemented) a clear definition of ''public charge'' that excluded from consideration non-cash benefits (other than institutionalization for long-term care at government expense).[135]

b. Discussion of Chilling Effects in the 2019 Final Rule

In the 2019 Final Rule, DHS adopted a markedly different approach to chilling effects as compared to the former INS's approach in the 1999 NPRM and 1999 Interim Field Guidance. In the 2019 Final Rule, DHS acknowledged that the rule could result in a chilling effect with respect to the use of public benefits by noncitizens, even among individuals who were not subject to the rule, and with respect to public benefits that are not covered by the rule.[136] DHS received a significant number of detailed public comments regarding the chilling effects of that rule.[137] Commenters pointed to past studies regarding the effects of PRWORA [138] on public benefits eligibility for noncitizens.[139] Some commenters discussed chilling effects that resulted from confusion and fear regarding the 2018 NPRM that preceded that 2019 Final Rule.[140] Some commenters reported direct knowledge of such effects.[141] In response to the comments, although DHS did not dispute the studies cited by commenters, DHS made three arguments regarding its approach in the 2019 Final Rule.

First, DHS emphasized that the government's interest, as stated in 8 U.S.C. 1601, in reducing noncitizens' incentive to immigrate to or adjust status in the United States due to the availability of public benefits, and in promoting the self-sufficiency of noncitizens within the United States, was ''a sufficient basis to move forward.'' [142] DHS also cited its ''authority to take past, current, and likely future receipt of public benefits into account, even where it may ultimately result in discouraging aliens from receiving public benefits.'' [143] Accordingly, DHS stated that it expected noncitizens seeking lawful permanent resident status or nonimmigrant status in the United States to ''make purposeful and well-informed decisions commensurate with the immigration status they are seeking.'' [144] Although DHS acknowledged that individuals subject to the 2019 Final Rule may decline to enroll in, or choose to disenroll from, public benefits for which they are eligible under PRWORA to avoid the 2019 Final Rule's negative consequences, DHS stated that it would not ''limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim.'' [145]

Second, DHS stated that it was ''difficult to predict the rule's disenrollment impacts with respect to the regulated population, although DHS has attempted to do so in the . . . Final Regulatory Impact Analysis'' that accompanied the 2019 Final Rule.[146] DHS stated that ''data limitations [have impeded DHS from developing] a precise count [or a] reasonable estimate of the number of aliens who are both subject to the public charge ground of inadmissibility and are eligible for public benefits in the United States.'' [147] But DHS also acknowledged that there is little overlap between the population regulated by the 2019 Final Rule and the public benefits considered in public charge inadmissibility determinations under the 2019 Final Rule:

- ''Aliens who are unlawfully present and nonimmigrants physically present in the United States . . . are generally barred from receiving federal public benefits other than emergency assistance''; [148]
- ''[A]pplicants for admission and adjustment of status . . . are generally ineligible for SNAP benefits and therefore, would not need to disenroll from SNAP to avoid negative consequences''; [149] and

[134] 64 FR 28676, 28677 (May 26, 1999).

[135] *See* 64 FR 28677, 28678–28686 (May 26, 1999).

[136] *See, e.g.,* 84 FR 41292, 41310 *et seq.* (Aug. 14, 2019).

[137] *See, e.g.,* 84 FR 41292, 41310 (Aug. 14, 2019) (''Commenters said that the rule's disenrollment effect would have lasting impacts on the health and safety of our communities and that immigrant families are experiencing significant levels of fear and uncertainty that has a direct impact on the health and well-being of children. Citing studies and research, many commenters asserted that the chilling effect will increase hunger, food insecurity, homelessness and poverty. They added that the chilling effect will also decrease educational attainment and undermine workers' ability to acquire new skills for in-demand occupations. Many commenters stated that negative public health, social, and economic outcomes (*e.g.,* hunger, food insecurity, decreased nutrition, unmet physical and mental health needs, unimmunized individuals, disease, decreased school attendance and performance, lack of education, poverty, homelessness) collectively damage the prosperity and health of our communities, schools, and country. Several commenters said that the rule would drive up uncompensated care costs, increase use of medical emergency departments, increase healthcare costs, endanger maternal and infant health, and heighten the risk of infectious disease epidemics. One commenter indicated that the rule would make child poverty worse and harm communities as well as infrastructure that serves all of us.'').

[138] *See* Public Law 104–193, title IV, 110 Stat. 2260 (1996).

[139] One commenter wrote that ''[a] U.S. Department of Agriculture analysis found that welfare reform's restrictions on legal immigrants' ability to receive food stamps appears to have deterred participation by their children, many of whom retained their eligibility.'' Another wrote that ''[r]esearch shows that following PRWORA, enrollment declined both in programs whose eligibility PRWORA did not change and among individuals and families that remained eligible (that is, who were unaffected by the *eligibility* changes but were fearful of receiving benefits).'' (emphasis in original.)

[140] A commenter reported that ''just months after the first leaks of the executive order, a Los Angeles-based health care provider serving a largely Latino community reported a 20 percent drop in SNAP enrollment and a 54 percent drop in Medicaid enrollment among children, as well as an overall 40 percent decline in program re-enrollments.'' Another reported that ''community providers have already reported changes in healthcare use, including decreased participation in Medicaid and WIC in the wake of the release of the draft proposal.''

[141] A commenter stated that ''[a]s the Intake Coordinator, I have spoken with several families whose children are in dire need of mental health services (experiencing depression, anxiety, grief, trauma, disruptive behaviors), but the caregivers are afraid to utilize their child's Medi-Cal insurance. As a result, these children are not receiving the services they need.''). Another stated that ''[l]ast year when there were early press accounts about a change in the public charge test, the health center's WIC program experienced a sudden drop off in attendance based on rumors in the immigrant community that it was no longer safe to participate in WIC.''

[142] *See* 84 FR 41292, 41312 (Aug. 14, 2019).

[143] *Ibid.*

[144] 84 FR 41292, 41312 (Aug. 14, 2019).

[145] *Ibid.*

[146] 84 FR 41292, 41312 (Aug. 14, 2019). The Final Regulatory Impact Analysis (RIA) did not contain any estimates that took into account the regulated population's actual eligibility for the covered benefits.

[147] DHS also wrote that the difficulty in producing an estimate ''is compounded by the fact that most applicants subject to the public charge ground of inadmissibility and therefore this rule are generally unlikely to suffer negative consequences resulting from past receipt of public benefits because they will have been residing outside of the United States and therefore, ineligible to have ever received public benefits.'' 84 FR at 41292, 41313 (Aug. 14, 2019).

[148] 84 FR 41292, 41313 (Aug. 14, 2019).

[149] 84 FR 41292, 41313 (Aug. 14, 2019).

• ''[C]ertain lawfully present children and pregnant women in certain states and the District of Columbia [are eligible for Medicaid, but] this final rule exempts receipt of Medicaid by such persons.'' [150]

Third, DHS wrote that it was ''difficult to predict the rule's disenrollment impacts with respect to people who are not regulated by this rule, such as people who erroneously believe themselves to be affected.'' [151] DHS wrote that

> because DHS will not consider the receipt of public benefits by U.S. citizens and aliens not subject to public charge inadmissibility . . . it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forgo enrollment in response to this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices.[152]

Instead, DHS committed itself to ''issue clear guidance that identifies the groups of individuals who are not subject to this rule,'' [153] and noted that DHS had excluded multiple public benefits from consideration.

c. Judicial Opinions Regarding Chilling Effects

Several courts have considered the appropriate role of chilling effects in public charge inadmissibility determinations. All the cases challenging the 2019 Final Rule involved allegations that DHS failed to adequately consider the potential chilling effects of the 2019 Final Rule. In a June 2020 opinion, the Seventh Circuit reasoned that the rule's chilling effects were foreseeable and, in some respects, represented a rational response by immigrants to the 2019 Final Rule, insofar as the 2019 Final Rule did not create a predictable framework for weighing past receipt of designated public benefits, and did not foreclose DHS from designating additional public benefits for consideration in the future.[154] The court held that DHS failed to adequately grapple with ''the collateral consequences of . . . disenrollments'' resulting from the rule, including ''reduce[d] access to vaccines and other medical care, resulting in an increased risk of an outbreak of infectious disease among the general public.'' [155] The court also held that DHS failed to adequately consider ''the added burden on states and local governments, which must disentangle their purely state-funded programs from covered federal programs,'' and noted that notwithstanding the rule's potential effects on State and local governments, DHS had also concluded that the rule would not have ''substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.'' [156]

In a December 2019 opinion that stayed multiple preliminary injunctions against the 2019 Final Rule, a panel of the Ninth Circuit Court of Appeals reasoned that DHS's ''only mandate is to regulate immigration and naturalization, not to secure transfer payments to state governments or ensure the stability of the health care industry. Any effects on those entities are indirect and well beyond DHS's charge and expertise.'' [157] But a later decision by the Ninth Circuit took an opposing view. The later panel emphasized the substantial evidence in the record regarding chilling effects and characterized the 2019 Final Rule's response to comments regarding chilling effects as ''a generality coupled with an expression of uncertainty.'' [158] The court found that, although ''[t]he record before DHS was replete with detailed information about, and projections of, disenrollment and associated financial costs to state and local governments . . . . DHS made no attempt to quantify the financial costs of the Rule or critique the projections offered.'' [159] The court concluded that DHS likely failed to satisfy its duty to ''examine the relevant data.'' [160] Similarly, with respect to the financial impacts of the 2019 Final Rule's public health consequences, the court found that ''DHS itself repeatedly acknowledged that hospitals might face financial harms as a result of the Rule, but DHS repeatedly declined to quantify, assess, or otherwise deal with the problem in any meaningful way.'' The court also observed that

> DHS insisted that vaccines would ''still be available'' to Medicaid-disenrolled individuals because ''local health centers and state health departments'' would pick up the slack . . . despite objections voiced by such local health centers and state health departments themselves showing that the Rule will put the populations they serve—citizens and non-citizens alike—in danger.[161]

Finally, in the Second Circuit, a panel that upheld a preliminary injunction against the rule cited the plaintiffs' allegations of chilling effects as being sufficient to establish standing.[162] However, the panel did not cite such chilling effects in its evaluation of the merits of the policy.[163]

d. Evidence of Chilling Effects Related to the 2019 Final Rule

DHS is aware of evidence that the 2019 Final Rule, and the rulemaking process that preceded it, resulted in significant disenrollment effects among noncitizens and U.S. citizens in immigrant families. For instance, in February 2021, the Urban Institute published a report describing the following survey findings:

• ''In 2020, almost one in seven adults in immigrant families (13.6 percent) reported that they or a family member avoided a noncash government benefit program, such as Medicaid, the Children's Health Insurance Program, the Supplemental Nutrition Assistance Program, or housing assistance, because of concerns about future green card applications. This 'chilling effect' was most significant in families more likely to be directly affected by the rule, those in which one or more members do not have a green card (27.7 percent).'' [164]

• ''In 2020, more than one in six adults in immigrant families (17.8 percent) reported avoiding a noncash government benefit program or other help with basic needs because of green card concerns or other worries about immigration status or enforcement. More than one in three adults in families in which one or more members do not have a green card (36.1 percent)

[150] 84 FR 41292, 41313 (Aug. 14, 2019).

[151] 84 FR 41292, 41313 (Aug. 14, 2019).

[152] 84 FR 41292, 41313 (Aug. 14, 2019).

[153] 84 FR 41292, 41313 (Aug. 14, 2019).

[154] *See Cook County Ill.* v. *Wolf,* 962 F.3d 208, 230–31 (7th Cir. 2020).

[155] *See Cook County Ill.,* 962 F.3d at 230–31.

[156] *See Cook County Ill.,* 962 F.3d at 230–31.

[157] *See City & Co. of San Francisco* v. *USCIS et al.,* 944 F.3d 773, 804 (9th Cir. 2019).

[158] *See City & Co. of San Francisco* v. *USCIS et al.,* 981 F.3d 742, 759 (9th Cir. 2020).

[159] *See City & Co. of San Francisco* v. *USCIS et al.,* 981 F.3d 742, 759 (9th Cir. 2020).

[160] *See City & Co. of San Francisco* v. *USCIS et al.,* 981 F.3d 742, 759 (9th Cir. 2020).

[161] *See City & Co. of San Francisco* v. *USCIS et al.,* 981 F.3d 742, 759 (9th Cir. 2020).

[162] *See New York* v. *DHS,* 969 F.3d 42, 59–61 (2020).

[163] A few days prior to the panel's decision, a court in the Southern District of New York had issued a second preliminary injunction against the 2019 Final Rule, based primarily on a range of alleged harms associated with the rule's chilling effects during the COVID–19 pandemic. *See New York* v. *DHS,* 475 F. Supp. 3d 208, 226–30 (S.D.N.Y 2020). The Second Circuit later stayed that second preliminary injunction, ''based primarily on the district court's apparent lack of jurisdiction to issue the preliminary injunction during the appeal of its prior, virtually identical injunction (coupled with DHS's showing of irreparable harm resulting from its inability to enforce its regulation).'' *See New York* v. *DHS,* 974 F.3d 210 (2d Cir. 2020).

[164] *See* Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), Immigrant Families Continued Avoiding the Safety Net during the COVID–19 Crisis 1 (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

reported these broader chilling effects.'' [165]

- ''Immigrant families avoided public benefits and supports not only because of perceived risks of how the public charge rule might affect their ability to secure a green card but because of broader immigration concerns, such as the risk of information being shared with immigration enforcement authorities or the deportation of family members.'' [166]

These findings were generally consistent with the findings described in prior reports, which documented similar chilling effects and confusion in the aftermath of the 2018 NPRM on public charge inadmissibility and after implementation of the 2019 Final Rule.[167]

Similarly, in December 2020, the Migration Policy Institute published an analysis showing that from 2017 to 2019,

> participation in [Temporary Assistance for Needy Families (TANF)], SNAP, and Medicaid declined twice as fast among noncitizens as citizens . . . . Between 2016 and 2019, the number of low-income noncitizens participating in SNAP fell by 37 percent, as did the number using TANF or similar cash assistance programs . . . . At the same time, Medicaid participation by low-income noncitizens fell by 20 percent. Across all the programs, the decline in participation for U.S.-born citizens was far smaller, decreasing only about half as much as for noncitizens and with even smaller drops for naturalized citizens.[168]

The analysis also showed notable declines ''among low-income U.S.-citizen children under age 18 with noncitizens in the household, as their program participation dropped almost as rapidly as that of noncitizens themselves . . . . Participation in [SNAP, TANF, and Medicaid] fell about twice as fast over the 2016 to 2019 period for U.S.-citizen children with noncitizens in the household as for those with only citizens in the household.'' [169]

Similar outcomes were described in an October 2019 report regarding immigrant communities in San Diego and San Francisco issued by the Kaiser Family Foundation. That report relayed qualitative assertions from various social and legal services providers that ''an increasing number of families are disenrolling themselves and their children from programs, including Medi-Cal (California's Medicaid program), and not renewing or not enrolling in programs even though they or their children are eligible and are not directly affected by the policy changes.'' [170] For instance, a family services provider is quoted as saying, ''they're scared to apply for certain much needed funding whether it's Calfresh [food assistance] or it's Medi-Cal, to get them the health insurance.'' [171] A health provider is quoted as stating that ''we had a patient who had a breast mass. Our physician had told her to go see a specialist. And because she had heard about public charge, she did not want to go see the specialist.'' [172]

An October 2019 Kaiser Family Foundation report described similar results, as follows:

- ''Based on findings from the health center survey, nearly half (47%) of health centers reported that many or some immigrant patients declined to enroll themselves in Medicaid in the past year . . . . In addition, nearly one-third (32%) said that many or some immigrant patients disenrolled from or declined to renew Medicaid coverage.'' [173]

- ''Health centers also report enrollment declines among children in immigrant families. More than a third of (38%) health centers reported that many or some immigrant patients were declining to enroll their children in Medicaid over the past year, while nearly three in ten (28%) reported many or some immigrant patients were disenrolling or deciding not to renew Medicaid coverage for their children.'' [174]

- ''Follow-up interviews with health center staff are consistent with these survey findings of declining Medicaid enrollment among immigrant patients and their families . . . . In addition, enrollment staff who assist patients in applying for Medicaid and other coverage have access to this information as part of the application process. At some health centers interviewed, these changes were widespread with many patients dropping Medicaid while at others, the changes were occurring among only a small number of patients.'' [175]

- ''Health center respondents reported that immigrant patients are increasingly afraid to disclose personal information. Interview respondents across all health centers reported that some immigrant patients have become reluctant to disclose any personal information out of fear that the health center would share that information with authorities.'' [176]

- ''Health center interview respondents reported that the patients disenrolling or declining to enroll in Medicaid are a broader group of immigrants than those targeted by the public charge rule . . . . Respondents also reported that patients have expressed concerns that enrolling their children in these programs, even if their children were born in the United States, may jeopardize their status or the status of family members. In addition, although pregnant women are categorically eligible for Medicaid and would be unaffected by public charge if they enroll in Medicaid, health center respondents reported that pregnant women are declining to enroll in Medicaid or disenrolling, in some cases out of fear of risking future opportunities for residency or citizenship.'' [177]

---

[165] *Ibid.*

[166] *Ibid.*

[167] *See* Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019 (Urban Institute) (accessed Jan. 26, 2022); Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2019), One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018 (Urban Institute).).

[168] *See* Randy Capps et al., Migration Policy Institute, Anticipated ''Chilling Effects'' of the Public-Charge Rule Are Real: Data Reflect Steep Decline in Benefits Use by Immigrant Families (Dec. 2020), *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 26, 2022).

[169] *See* Randy Capps et al., Migration Policy Institute, Anticipated ''Chilling Effects'' of the Public-Charge Rule Are Real: Data Reflect Steep Decline in Benefits Use by Immigrant Families (Dec. 2020), *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 26, 2022).

[170] *See* Samantha Artiga et al., Kaiser Family Foundation, Issue Brief: Addressing Health and Social Needs of Immigrant Families: Lessons from Local Communities at 7 (Oct. 28, 2019), *available at https://www.kff.org/report-section/addressing-health-and-social-needs-of-immigrant-families-lessons-from-local-communities-issue-brief/* (accessed Jan. 26, 2022).

[171] *See* Samantha Artiga et al., Kaiser Family Foundation, Issue Brief: Addressing Health and Social Needs of Immigrant Families: Lessons from Local Communities at 7 (Oct. 28, 2019), *available at https://www.kff.org/report-section/addressing-health-and-social-needs-of-immigrant-families-lessons-from-local-communities-issue-brief/* (accessed Jan. 26, 2022).

[172] *See* Samantha Artiga et al., Kaiser Family Foundation, Issue Brief: Addressing Health and Social Needs of Immigrant Families: Lessons from Local Communities at 8 (Oct. 28, 2019), *available at https://www.kff.org/report-section/addressing-health-and-social-needs-of-immigrant-families-lessons-from-local-communities-issue-brief/* (accessed Feb. 12, 2021).

[173] Jennifer Tolbert et al., Kaiser Family Foundation, Issue Brief: Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients at 2 (Oct. 15, 2019), *available at https://www.kff.org/medicaid/issue-brief/impact-of-shifting-immigration-policy-on-medicaid-enrollment-and-utilization-of-care-among-health-center-patients/* (accessed Feb. 14, 2021).

[174] *Id.* at 2–3.

[175] *Id.* at 3.

[176] *Ibid.*

[177] *Id.* at 5.

• ''Fear of public charge implications extends beyond Medicaid to other health and social service programs, including some that are not included in the public charge rule . . . . Several respondents noted that their WIC caseloads are down and attributed the trend to public charge fears. Respondents in California and Missouri also noted that immigrant patients are declining to enroll in or accept referrals for state and local food assistance programs, even though these programs are not subject to public charge. A health center serving New York City reported that patients with HIV or AIDS are hesitating to enroll in or are disenrolling from the city-run HIV/AIDS Services Administration (HASA) program out of fear that the program's services fall under the public charge rule.'' [178]

The Kaiser Family Foundation report, like the other reports described in this section, raises critical questions about the chilling effects of the 2019 Final Rule on noncitizens and citizens alike, including pregnant women and children.

e. Comments on Chilling Effects in Response to the 2021 ANPRM

On August 23, 2021, DHS issued an ANPRM on the public charge ground of inadmissibility.[179] In the ANPRM, DHS asked the public how it should address the possibility that individuals who are eligible for public benefits, including U.S. citizen relatives of noncitizens, would forgo the receipt of those benefits as a result of DHS's consideration of certain public benefits in the public charge inadmissibility determination. DHS asked for any data and information it should consider about the direct and indirect effects of past public charge policies in this regard. In addition, DHS asked about data that it could use to estimate any potential direct and indirect effects, economic or otherwise, of the public charge ground of inadmissibility related to the 2019 Final Rule. DHS also specifically sought information from State, territorial, local, and Tribal benefit granting agencies regarding impacts of the 2019 Final Rule on the application for or disenrollment from public benefit programs, including how DHS could reduce the likelihood that individuals would forgo public benefits out of concern over immigration consequences of such receipt. Commenters overwhelmingly confirmed the existence of chilling effects and cited to studies and data regarding the same.

For example, a group of 21 Attorneys General urged DHS to weigh and avoid chilling effects when crafting future public charge policies. These commenters stated that, as a consequence of the 2019 Final Rule, increasing numbers of immigrants disenrolled from or declined to enroll in public benefits programs, including programs not covered by the rule. This may have led, for instance, to a ''nationwide decrease of approximately 260,000 enrollees in child Medicaid and 21,000 enrollees'' in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), neither of which would have been considered under the 2019 Final Rule in any event.[180] The commenters stated that, according to State benefit granting agencies, because the public charge inadmissibility formula in the 2019 Final Rule was so complex and layered, it was extraordinarily difficult for immigrants and service providers to understand whether or how it applied to them. Those commenters said that many immigrants avoided benefits out of fear and confusion. To underscore the severity of the impact, commenters noted that these immigrants even avoided important benefits like medical care during a pandemic.

With respect to health effects, in particular, the American Medical Association (AMA) commented that the potential wide-reaching effect of the 2019 Final Rule was anticipated and acknowledged in the 2019 Final Rule and that those predictions were proven to be true, stating that half of the immigrant families surveyed said they had avoided using Medicaid, CHIP, or SNAP.[181] But the commenter acknowledged that most of the individuals who chose not to access non-cash benefits were not subject to the 2019 Final Rule.[182] Like other commenters, the AMA highlighted the amplified chilling effects during the pandemic, stating that ''the lead up to, and short-term change of, the public charge rule had a far-reaching chilling effect on the immigrant population and caused eligible individuals to not access benefits during a time when they were most needed, the COVID–19 public health emergency.'' [183] The AMA stated that researchers using Census Bureau data have found that, during the public health emergency, ''the public charge policy likely caused 2.1 million essential workers and household members to forgo Medicaid and 1.3 million to forgo SNAP'' [184] during a time when 41.4 percent of low-income immigrant families were experiencing food insecurity and 52.1 percent were worried about being able to pay for medical costs.[185]

Similarly, another commenter noted that while chilling effects would have been damaging under any circumstances, they were particularly devastating when the COVID–19 pandemic struck in the United States. The commenter cited to recent evidence that the chilling effect is still impacting many immigrant communities, even though DHS stopped applying the 2019 Final Rule in March 2021.[186]

A Latino civil rights and advocacy group cited to a Kaiser Family Foundation study, which found that 35 percent of Latino respondents, and 63 percent in the case of potentially undocumented Latino adults, cited

[178] *Ibid.*

[179] Public Charge Ground of Inadmissibility; Advance Notice of Proposed Rulemaking and Notice of Virtual Public Listening Sessions, 86 FR 47025 (Aug. 23, 2021).

[180] Alma Guerrero, M.D., M.P.H, et al., Forgoing Healthcare in a Global Pandemic: The Chilling Effects of the Public Charge Rule on Health Access Among Children in California, UCLA Latino Policy & Politics Initiative (Apr. 07, 2021), *https://latino.ucla.edu/research/public-charge-ca-children/;* Leslie Berestein Rojas, Thousands Of LA Immigrant Families Are No Longer Enrolled In Public Benefits. A Pending Trump Rule Could Be Why, LAist (Aug. 02, 2019), *https://laist.com/news/thousands-of-la-immigrant-families-are-no-longer-enrolled-in-public-benefits-a-pending-trump-rule-co.*

[181] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019 (Urban Institute). *https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_2.pdf* (accessed Jan 26, 2022).

[182] Shaw, April. The Public Charge Rule and Public Health (Apr. 6, 202), Network for Public Health Law, *https://www.networkforphl.org/resources/the-public-charge-rule-and-public-health/* (accessed Jan. 18, 2022).

[183] Barofsky, Jeremy et al. Spreading Fear: The Announcement of The Public Charge Rule Reduced Enrollment in Child Safety-Net Programs (Oct. 2020); Health Affairs Vol. 39, No.10: Children's Health *https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763* (accessed Jan. 18, 2022).

[184] Touw, Sharon, McCormack, Grace, Himmelstein, David, Woolhandler, Steffie, and Zallman, Leah. ''Immigrant Essential Workers Likely Avoided Medicaid And SNAP Because Of A Change To The Public Charge Rule,'' (Jul. 2021) Health Affairs, *https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2021.00059* (accessed Jan. 18, 2022).

[185] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2021), Adults in Low-Income Immigrant Families Were Deeply Affected by the COVID–19 Crisis yet Avoided Safety Net Programs in 2020, (The Urban Institute), available at *https://www.urban.org/research/publication/adults-low-income-immigrant-families-were-deeply-affected-covid-19-crisis-yet-avoided-safety-net-programs-2020* (accessed Jan. 26, 2022).

[186] Protecting Immigrant Families (PIF), Research Documents Harm of Public Charge Policy During the COVID–19 Pandemic, (Aug. 2021), *https://protectingimmigrantfamilies.org/wp-content/uploads/2022/01/PIF-Research-Document_Public-Charge_COVID-19_Jan2022.pdf.*

concerns that receiving the COVID–19 vaccine would negatively affect either their own or a family member's immigration status, or both.[187] Similarly, a poll conducted by the commenter found that 14 percent of parents are concerned that getting their child vaccinated against COVID–19 might cause immigration problems for themselves or their family.[188]

A State agency wrote that, following issuance of the 2019 Final Rule, the agency

> spoke to numerous noncitizens who were afraid to apply for public benefits for their U.S. citizen children. This was particularly apparent when [the agency] began its Pandemic-Electronic Benefit Transfer (EBT) program for children. The [agency] program automatically provided food assistance in the form of an EBT card to families in Chicago with children enrolled in the Chicago Public Schools and provided ready to go meals at schools during the height of the pandemic. Many parents did not utilize the assistance for fear of being deemed a public charge in the future.

The same agency expressed concern that ''if [medical or nutrition benefits] are included in a new public charge rule or if the new final rule is as cumbersome and untenable'' as was the 2019 Final Rule, the rule would ''likely increase demand for other state-funded social services, such as non-Medicaid behavioral health services, emergency food assistance, and other safety net resources.''

When addressing how DHS could reduce or minimize chilling effects when issuing rules addressing public charge inadmissibility, commenters had a number of suggestions, including:

- Consider only the use of cash assistance from TANF and SSI in public charge determinations, not the use of Medicaid, SNAP, or public housing benefits, including Medicaid institutional care benefits.
- Exclude consideration of other public benefits, such as the Children's Health Insurance Program, the health insurance marketplaces, WIC, or National School Lunch or Breakfast programs, or receipt of the Earned Income or Child Tax Credit.
- Exclude dependents' and family members' use of benefits, especially use of benefits by children, as well as by those who use benefits due to reasons such as domestic violence.
- Exclude past, current, or future receipt of public benefits from public charge inadmissibility determinations, and instead only find noncitizens inadmissible if they are determined to be likely in the future to rely on the Federal Government to such an extent that the reliance is permanent, primary, and total, meaning the use of the benefits is necessary to avoid destitution.
- Limit public charge consideration to only two Federal cash-assistance programs (TANF and SSI), and excluding all State, local, and Tribal benefits from consideration, to make the guidelines simple to communicate and understand.
- Clearly define which public benefits would not be considered in a public charge inadmissibility determination (*e.g.,* SNAP, CHIP, Medicaid, and Affordable Care Act premium subsidies for health coverage through an exchange).

In addition, commenters emphasized the importance of simple, streamlined, and easy to communicate rules, and encouraged DHS and other Federal agencies to provide outreach to immigrant communities about the relief afforded by any revised rules.

DHS appreciates that the consideration of past and current benefit receipt has resulted and may continue to result in chilling effects, notwithstanding that few categories of noncitizens are actually subject to the public charge ground of inadmissibility, and these categories of noncitizens would likely not have received such benefits to begin with. As discussed elsewhere in this preamble, however, DHS nonetheless believes that it is important to consider a noncitizen's past or current receipt of certain benefits, to the extent that such receipt occurs, as part of the public charge inadmissibility determination.

DHS remains interested in public comment regarding ways to shape public communications around the final rule to mitigate chilling effects among U.S. citizens and among the great majority of noncitizens who are either ineligible for the public benefits covered by this rule prior to admission or adjustment of status or are exempt from a public charge determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Although such communications materials are not part of the rulemaking, DHS is keenly aware of the established effects of its actions in this policy area and wishes to ensure that the final rule faithfully applies the public charge statute without causing undue confusion among the public.

8. Other Burdens of the 2019 Final Rule

The 2019 Final Rule imposed a range of burdens separate and apart from the chilling effects described above. Commenters responding to the ANPRM, as well as those participating in the listening sessions, expressed concerns regarding those burdens. These comments echoed concerns raised in response to the 2018 NPRM. DHS briefly describes the most recent public input here.

Some commenters focused on the information collection and evidentiary burdens associated with the rule. Many commenters objected to the burden of collecting documentation for and completing the Form I–944. The Form I–944, together with its instructions, spanned 30 pages and requested a wide range of information on the statutory minimum factors, some of which was duplicative of other filings. Information and supporting documentation included, for instance, an accounting of all liabilities and debts; a list of all assets that can be converted into cash within 12 months; account statements, evidence of real estate value, and other evidence of the value of assets; credit report, if available (or documentation showing that no such report is available); proof of health insurance; and copies of W–2s and income tax returns.

One commenter, a professional association, noted that the scope and burden of the Form I–944

> created a variety of practical problems. The first is one of simple adjudicative inefficiency. Instead of an adjustment of status application consisting of completed forms and a reasonable number of supporting documents, filings would include hundreds or even thousands of pages of supporting financial documents. USCIS was then charged with maintaining and organizing this voluminous documentation simply to reach the obvious conclusion that an employment-based immigrant, many of whom are offered employment at high salaries well above the poverty line, [is] unlikely to become a public charge.

The commenter also noted that the form's scope and burden forced applicants to choose between seeking adjustment of status and collecting and then transmitting, first to an attorney and then to USCIS, a wide range of sensitive financial documents. The commenter encouraged USCIS to limit information collection regarding financial status from employment-based immigrants who have an approved immigrant visa petition containing a valid labor certification or (for an

[187] Hamel, Liz et al., KFF COVID–19 Vaccine Monitor: COVID–19 Vaccine Access, Information, and Experiences Among Hispanic Adults in the U.S., Kaiser Family Foundation (May 13, 2021), *https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-access-information-experiences-hispanic-adults/.*

[188] UnidosUS, ''National Survey of Latino Parents: Economic Concerns and Vaccine Access for Children,'' (Washington DC: UnidosUS, September 14, 2021), *https://www.unidosus.org/publications/national-survey-of-latino-parents-economic-concerns-and-vaccine-access-for-children/*

immigrant category for which a labor certification is not required) a valid U.S. job offer.

Other commenters focused on the 2019 Final Rule's burdens on public benefit agencies, healthcare providers, and others who interacted with the public in connection with public benefits and therefore expended resources to familiarize themselves with the 2019 Final Rule and to communicate with the public about the rule's terms. Commenters stated that this kind of research and outreach went well beyond the staff's skills and typical responsibilities.

One State agency wrote that it ''incurred significant costs to support the needs of immigrant-serving community organizations and in responding to the fear and confusion caused by the 2019 public charge rule (published as an NPRM in October 2018 but broadly leaked and reported on in spring 2018).'' The agency issued multiple grants to address misinformation and fear in communities and fund family counseling related to the 2018 NPRM and 2019 Final Rule. The commenter wrote that ''staff dedicated hundreds of hours planning and implementing State help for immigrants completing the [Form I–944, including] dozens of meetings with both internal staff members and cross-agency staff members, as well as external partners who work with immigrant communities to understand the extensive requirements of the [Form I–944].'' The commenter wrote that the resource burden centered on the Form I–944's questions related to the type, amount, and dates of all benefits ever applied for or received, which in the commenter's view were so detailed as to ''[make] it highly unlikely that any noncitizen subject to the 2019 rule would have been able to complete the form without intensive consultation with IDHS caseworkers, potentially even caseworkers in multiple states, and/or administering agencies.''

Following issuance of the 2019 Final Rule, the commenter observed ''a significant increase in the number of customers to our offices. The amount of work needed to prepare for and meet this demand was overwhelming.'' The commenter wrote that ''[t]he expense of training caseworkers alone cost more than 2,700 person hours and $91,000. Caseworkers were needed to provide information and services to individuals seeking to disenroll from benefits. The estimated administrative cost ranges from 61,500 to 143,500 person hours and over $3 million.''

Similarly, another commenter on the ANPRM stated their belief that the 2019 Final Rule ''used administrative burdens as a tool to keep people from adjusting their status with the creation of the I–944'' which, in their view, imposed a huge paperwork burden on applicants, legal services providers, and attorneys. This commenter went on to state that ''[a]dministrative burdens have a disproportionately harmful effect on people with fewer resources'' and that such administrative burdens ''like onerous paperwork, complex requirements, and opaque guidelines are barriers to equity in federal policies and programs.''

9. The COVID–19 Pandemic

Although DHS believes that the approach contained in this proposed rule would be warranted, on both legal and policy grounds, regardless of the effects of the COVID–19 pandemic, DHS includes brief background on the pandemic's effects for three reasons. First, the onset of the COVID–19 pandemic coincided with the implementation of the 2019 Final Rule and had widespread effects on the same population that adjusted their behavior in response to the 2019 Final Rule. As a result, the COVID–19 pandemic's effects necessarily serve as relevant historical context when considering the effects of the 2019 Final Rule. Second, although DHS recognizes that the COVID–19 pandemic has evolved, the pandemic's effects continue, in a variety of ways, to this day. Third, the current COVID–19 pandemic provides certain evidence that another pandemic is not a hypothetical concern and illustrates the importance that this rule account for similar occurrences in the future. The following description is thus a relevant context for this proposed rule as well.

a. The COVID–19 Pandemic and Its Effects on Public Health and the Economy

Beginning as early as December 2019, just a few months after publication of the 2019 Final Rule, there was an outbreak of a novel coronavirus, now known as severe acute respiratory syndrome coronavirus 2 (SARS–CoV–2), and the disease it causes, now known as coronavirus disease 2019 (COVID–19).[189] On January 30, 2020, the Director-General of the World Health Organization (WHO) declared the outbreak a ''public health emergency of international concern'' under the International Health Regulations (2005) and on March 11, 2020, the WHO announced that the COVID–19 outbreak can be characterized as a pandemic.[190] On January 31, 2020, the Secretary of HHS declared a public health emergency dating back to January 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID–19.[191] On March 13, 2020, President Trump declared a National Emergency concerning the COVID–19 outbreak to control the spread of the virus in the United States.[192]

The virus that causes COVID–19 is characterized by easy airborne transmission among individuals in close physical proximity (within about 6 feet), and it can be spread by both symptomatic and certain asymptomatic carriers.[193] Among adults, the risk for severe illness from COVID–19 (*e.g.,* illness requiring hospitalization, intensive care, and ventilator use)[194] increases with age, with older adults at highest risk, as well as people of any age with underlying medical conditions.[195]

The COVID–19 pandemic's effects have been vast, including within the United States, and they are ongoing. As

[189] *See* Wang, Chen et al., Comment: A Novel Coronavirus Outbreak of Global Health Concern, The Lancet (Jan. 24, 2020), *available at https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30185-9/fulltext.*

[190] *See* WHO, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019–nCoV) (Jan. 30, 2020), *available at https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)* and WHO, Listing of WHO's Response to COVID–19, *https://www.who.int/news/item/29-06-2020-covidtimeline.*

[191] Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020). *See also* HHS Renewal of Determination That A Public Health Emergency Exists, *https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx* (Jan. 14, 2022). The determination that a public health emergency exists due to COVID–19 has subsequently been renewed seven times: On April 21, 2020, on July 23, 2020, on October 2, 2020, on January 7, 2021, on April 15, 2021, on July 19, 2021, on October 15, 2021, and most recently on January 14, 2022, effective January 16, 2022.

[192] Proclamation 9994 of Mar. 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

[193] *See* Centers for Disease Control & Prevention (CDC), How COVID–19 Spreads (updated July 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html* (accessed Jan. 25, 2022); and Centers for Disease Control & Prevention (CDC), How COVID–19 Spreads (updated July 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html* (accessed Jan. 25, 2022).

[194] *See* Centers for Disease Control & Prevention (CDC), People with Certain Medical Conditions (updated Dec. 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html* (accessed Jan. 27, 2022).

[195] *See* Centers for Disease Control & Prevention (CDC), How COVID–19 Spreads (updated July 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html* (accessed Jan. 25, 2022).

of February 8, 2022, a total of 903,038 COVID–19 deaths have been reported in the United States.[196] As of February 8, 2022, the 7-day moving average of daily deaths in the United States was 2,303[197] and the 7-day moving average of hospitalizations was 102,695.[198] Effects on the U.S. economy as a result of the COVID–19 pandemic have been dramatic. Soon after the COVID–19 pandemic began, the United States witnessed widespread job losses and food insecurity. In March 2020, the U.S. Bureau of Labor Statistics estimated that the seasonally adjusted domestic unemployment rate was 4.4 percent.[199] That number spiked to 14.8 percent in April, and it gradually fell to 6.3 percent by January 2021.[200] The unemployment rate for January 2022 was 4.0 percent.[201] While the high unemployment rate has declined significantly, the United States is now experiencing high demand for labor as compared to the available supply of workers.[202] As of November 2021, the labor force participation rate was at 61.8 percent, having recovered about half of what was lost at height of the COVID–19 pandemic compared with the February 2020 rate of 63.3 percent.[203] In addition, the full scope of implications of the emergence of the Omicron variant, and the potential effects of future variants, for public health,[204] inflation,[205] and supply chains[206] remains uncertain.

The COVID–19 pandemic's effects on food insecurity have at times also been severe. Prior to March 13, 2020, of 250 million persons surveyed, 20 million reported that they ''often'' or ''sometimes'' did not have enough to eat.[207] By December 9, 2020, that figure had increased by 50 percent to 30 million people.[208] From March to September 2020, the number of people participating in SNAP increased from around 37.2 million to 42.9 million, and the number of participating households increased from around 19 million to 22.6 million.[209] That number has since decreased but has not returned to pre-pandemic levels. As of October 2021, the number of people participating in SNAP decreased to 41.1 million, and the number of households to 21.3 million.[210] In addition, multiple States are administering Pandemic Electronic Benefit Transfer (P–EBT) programs for school-age children. As of September 2020, over 10.9 million people and 7.3 million households were participating in this program.[211] As of October 2021, this number only marginally decreased to 10.0 million people but increased to 8.8 million households.[212]

The COVID–19 pandemic has also had major impacts on State, Tribal, territorial, and local governments, which have played a critical role in responding to the pandemic.[213] Projections indicated that use of State and local spending programs is likely to increase, particularly for public welfare programs and hospital and health expenses.[214] Congress has appropriated significant funding to support these governments through the Coronavirus Relief Fund.[215]

Finally, the COVID–19 pandemic has created significant pressures on health care providers. For instance, community health centers have experienced a decline in patient visits, staffing, and revenue. By one estimate, as of December 2020, the decline in patient visits may have translated into over $4 billion in revenue losses nationwide, ''an amount that represents 12.7 percent of total revenue reported nationally in 2019.''[216] In September 2021, prior to the emergence of the Omicron variant, one analysis projected that hospitals nationwide would lose an estimated $92 billion in net income over the course of

[196] *See* CDC, United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, *https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days* (accessed Feb. 8, 2022).

[197] *See* CDC, Daily Trends in Number of COVID–19 Deaths in The United States Reported to CDC, *available at https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths* (accessed Feb. 10, 2022).

[198] *See* CDC, Prevalent Hospitalizations of Patents with Confirmed COVID–19, United States, *available at https://covid.cdc.gov/covid-data-tracker/#hospitalizations* (accessed Feb. 10, 2022).

[199] *See* U.S. Bureau of Labor Statistics, Graphics for Economic News Releases: Civilian Unemployment Rate, *available at https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm* (accessed Feb. 9, 2022).

[200] *Id.*

[201] *Id.*

[202] The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 11 million job openings in October 2021 (compared to 6.8 million job openings in October 2020). *See* Bureau of Labor Statistics, Job Openings and Labor Turnover Survey released on December 8, 2021, at *https://www.bls.gov/news.release/archives/jolts_12082021.htm.*

[203] *See* CNN, Three key numbers that explain America's labor shortage (Dec. 25, 2021), *https://www.cnn.com/2021/12/25/economy/labor-shortage-early-retirement-charts/index.html* (accessed Jan. 18, 2021).

[204] *See* Annika Kim Constantino, *Omicron detected in Florida and Texas as it takes root in 25 U.S. states,* CNBC, *https://www.cnbc.com/2021/12/10/omicron-detected-in-florida-texas-and-other-states-as-it-takes-root-across-the-us-.html* (accessed Dec. 10, 2021).

[205] On December 10, 2021, BLS reported that the CPI–U increased 0.8 percent in November on a seasonally adjusted basis after rising 0.9 percent in October. Over the previous 12 months, the all items index increased 6.8 percent before seasonal adjustment. *See* BLS, Economic News Release, Consumer Price Index Summary (Dec. 20, 2021), *https://www.bls.gov/news.release/cpi.nr0.htm.*

[206] *See, e.g.,* Mitchell Hartman, *Omicron's impact on inflation and supply chains is uncertain,* Marketplace, *https://www.marketplace.org/2021/12/01/omicrons-impact-on-inflation-and-supply-chains-is-uncertain/* (Dec. 1, 2021) (''People have trouble getting to work through lockdowns and what have you, and labor gets scarcer—particularly for those jobs where being present at work matters. Supply goes down and has an upward pressure on pricing . . .''); Alyssa Fowers & Rachel Siegel, *Five charts explaining why inflation is at a near 40-year high,* Wash. Post, *https://www.washingtonpost.com/business/2021/10/14/inflation-prices-supply-chain/* (Oct. 14, 2021, last updated Dec. 10, 2021) (''Prices for meat, poultry, fish and eggs have surged in particular above other grocery categories. The White House has pointed to broad consolidation in the meat industry, saying that large companies bear some of the responsibility for pushing prices higher . . . Meat industry groups disagree, arguing that the same supply-side issues rampant in the rest of the economy apply to proteins because it costs more to transport and package materials, while tight labor market has held back meat production.'').

[207] U.S. Census Bureau, Week 1 Household Pulse Survey: April 23–May 5, Food Table 2a. Food Sufficiency for Households, Prior to COVID–19 Pandemic, by Select Characteristics: United States, *available at https://www.census.gov/data/tables/2020/demo/hhp/hhp1.html#setables* (accessed Jan. 27, 2022).

[208] U.S. Census Bureau, Week 21 Household Pulse Survey: December 9 to December 21, Food Table 2b. Food Sufficiency for Households, In the Last Seven Days, by Select Characteristics: United States, *available at https://www.census.gov/data/tables/2020/demo/hhp/hhp21.html#setables* (accessed Jan. 23, 2021).

[209] *See* Food and Nutrition Service, National and/or State Level Monthly and/or Annual Data, FY16 through FY20 National View Summary (Latest Available Month: September 2020), *available at https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap* (accessed Feb. 11, 2021).

[210] *See* Food and Nutrition Service, Supplemental Nutrition Assistance Program (Data as of Jan. 7, 2022), Monthly Data FY 2019 through FY 2022, *https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-1.pdf* (accessed Jan. 18, 2022).

[211] *See* Food and Nutrition Service, Pandemic EBT Program Participation and Benefits—FY 20, *available at https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap* (accessed Feb. 11, 2021).

[212] See Food and Nutrition Service, Pandemic EBT (P–EBT) Program (data as of Jan. 7, 2022), *https://fns-prod.azureedge.net/sites/default/files/resource-files/40PEBTPart%24-1.pdf* (accessed Jan. 18, 2022).

[213] *See* Cong. Res. Serv., General State and Local Fiscal Assistance and COVID–19: Eligible Purposes, Allocations, and Use Data, R46990 (Dec. 16, 2021).

[214] *Ibid.*

[215] *Ibid.*

[216] *See* Sharac, Jessica et al., Geiger Gibson/RCHN Community Health Foundation Research Collaborative, Data Note: Key Updates from the Health Center COVID–19 Survey (Week #36): The Status of Community Health Centers in the Midst of the Worst Phase of the COVID–19 Pandemic, at 7–9, available at *https://www.rchnfoundation.org/?p=9394* (accessed Feb. 12, 2021).

that year, or $54 billion taking into account certain Federal funding.[217]

b. Nationwide Vaccination Effort

The COVID–19 vaccination effort in the United States began in mid-December 2020, after the U.S. Food and Drug Administration granted the first vaccine emergency use authorization.[218] As of February 9, 2022, 213.2 million (64.2 percent) of the U.S. population was fully vaccinated, and 251.5 million (75.7 percent) had received at least one shot.[219]

On January 4, 2022, Centers for Disease Control and Prevention (CDC) recommended the use of the Pfizer booster 5 months after becoming fully vaccinated.[220] On January 7, 2022, CDC recommended the use of the Moderna booster 5 months after becoming fully vaccinated.[221] As of February 9, 2022, 90.5 million people (42.5 percent) have received a booster dose.[222]

c. The COVID–19 Pandemic's Effects on Vulnerable Communities

From the outset, many of the COVID–19 pandemic's effects have been felt most acutely in more vulnerable communities, including localities with high poverty rates and among certain racial and ethnic populations. For instance, the cumulative COVID–19 case rate on a per capita basis has consistently been higher in counties with a higher percentage of their population in poverty. As of January 27, 2022, counties with ''Low'' such percentages (0 percent to 12.3 percent) had experienced a cumulative case rate of approximately 20,426 cases per 100,000 persons. By contrast, counties with Moderate (12.3 percent to 17.3 percent) and High (>17.3 percent) percentages experienced case rates of approximately 22,555 and 23,720 per 100,000 persons, respectively.[223] The relative disparities are greater with respect to COVID–19 deaths. As of January 27, 2022, cumulative COVID–19 deaths ranged from 216 per 100,000 in counties falling within the ''Low'' classification, to 275 and 339 for ''Moderate'' and ''High,'' respectively.[224]

Similarly, the cumulative case rate on a per capita basis has consistently been higher in counties with a higher percentage of uninsured individuals. As of January 27, 2022, counties with ''Low'' percentages of uninsured individuals (0 percent to 7.1 percent) had experienced a cumulative case rate of approximately 20,822 cases per 100,000 persons. By contrast, counties with Moderate (7.1 percent to 11.4 percent) and High (>11.4 percent) percentages of uninsured persons experienced rates of approximately 22,719 and 23,022 per 100,000 persons, respectively.[225] The pattern is similar with respect to COVID–19 deaths. As of January 27, cumulative COVID–19 deaths ranged from 235 per 100,000 in counties falling within the ''Low'' classification, to 268 and 305 for ''Moderate'' and ''High,'' respectively.[226] Although most of the uninsured are citizens, noncitizens are significantly more likely than citizens to be uninsured. In 2018, among the nonelderly population, 23 percent of lawfully present noncitizens and more than 4 in 10 (45 percent) undocumented noncitizens were uninsured compared to less than 1 in 10 (9 percent) citizens. Moreover, among citizen children, those with at least one noncitizen parent are more likely to be uninsured compared to those with citizen parents (8 percent vs. 4 percent).[227]

Similarly, some racial and ethnic groups have experienced higher rates of COVID–19 cases and deaths as compared to the general population. Through January 31, 2022, the CDC data on race and ethnicity for 85 percent of the people who have died from COVID–19 reveal that the percent of non-Hispanic American Indian/Alaska Native, non-Hispanic Black, and non-Hispanic Native Hawaiian/Other Pacific Islander people who have died from COVID–19 is higher than the percent of these racial and ethnic groups in the total U.S. population.[228] Through January 31, 2022, the CDC data on race and ethnicity for 65 percent of the people who have been infected by COVID–19 show that the percent of Hispanic/Latino, non-Hispanic American Indian/Alaska Native, and non-Hispanic Native Hawaiian/Other Pacific Islander people who have had COVID–19 cases is higher than the percent of these racial and ethnic groups in the total U.S. population.[229]

These disparities likely trace to a range of factors, including disparities in access to telework in certain communities. Research shows that

> [r]acial minorities and low-income workers, including immigrants, have fewer opportunities to work from home because more of them tend to work in service industries. As a result, immigrants working in factories, supermarkets, delivery, sanitation, and poultry and meat processing sectors are more likely to be exposed to COVID–19.[230]

Immigrants are also more likely to feel pressure to continue to go to work due to the disproportionate job losses experienced in such industries.[231] DHS

[217] *See* Kaufman Hall, Financial Effects of COVID–19: Hospital Outlook for the Remainder of 2021 at 7 (Sept. 2021), *https://www.aha.org/guidesreports/2021-09-21-financial-effects-covid-19-hospital-outlook-remainder-2021* (accessed Jan. 26, 2022).

[218] See, U.S. Department of Health and Human Services, COVID–19 Vaccines; Timeline *https://www.hhs.gov/coronavirus/covid-19-vaccines/index.html* (accessed Feb. 10, 2022).

[219] *See* CDC, COVID–19 Vaccinations in the United States, *https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total* (accessed Feb. 9, 2022).

[220] *See* CDC, CDC Recommends Pfizer Booster at 5 Months, Additional Primary Dose for Certain Immunocompromised Children | CDC Online Newsroom (Jan. 4, 2022), *https://www.cdc.gov/media/releases/2022/s0104-Pfizer-Booster.html* (accessed Jan. 18, 2022).

[221] *See* CDC, CDC Recommends Moderna Booster at 5 Months (Jan. 7, 2022), *https://www.cdc.gov/media/releases/2022/s0107-moderna-booster.html* (accessed Jan. 18, 2022).

[222] *See* CDC, COVID–19 Vaccinations in the United States (Jan. 15, 2022), *https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total* (accessed Feb. 9, 2022).

[223] *See* CDC, Trends in COVID–19 Cases and Deaths in the United States, by County-level Population Factors, *available at https://covid.cdc.gov/covid-data-tracker/#pop-factors_totalcases* (sorted by United States/Percent of Population in Poverty/Cases/Cumulative) (accessed Jan. 27, 2022).

[224] *See* CDC, Trends in COVID–19 Cases and Deaths in the United States, by County-level Population Factors, available at *https://covid.cdc.gov/covid-data-tracker/#pop-factors_totaldeaths* (sorted by United States/Percent of Population in Poverty/Deaths/Cumulative) (accessed Jan. 27, 2022).

[225] *See* CDC, Trends in COVID–19 Cases and Deaths in the United States, by County-level Population Factors, *available at https://covid.cdc.gov/covid-data-tracker/#pop-factors_totalcases* (sorted by United States/Percent of Population Uninsured/Cases/Cumulative) (accessed Jan. 27, 2022).

[226] *See* CDC, Trends in COVID–19 Cases and Deaths in the United States, by County-level Population Factors, *available at https://covid.cdc.gov/covid-data-tracker/#pop-factors_totaldeaths* (sorted by United States/Percent of Population Uninsured/Deaths/Cumulative) (accessed Jan. 27, 2022).

[227] *See* Kaiser Family Foundation, Health Coverage of Immigrations (Mar. 18, 2020), available at *https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/* (accessed Jan. 27, 2022).

[228] *See* CDC, Deaths by Race/Ethnicity—All Age Groups, available at *https://covid.cdc.gov/covid-data-tracker/#demographics* (accessed Feb. 1, 2022).

[229] *Ibid.*

[230] *See* Indiana University Public Policy Institute, Immigration Policy and COVID–19: Implications of the Public Charge Rule (June 2020), *available at https://policyinstitute.iu.edu/doc/covid-19-public-charge-immigration-brief.pdf* (accessed Jan. 27, 2022) (citing Elise Gould et al., Economic Policy Institute, Not Everybody Can Work from Home: Black and Hispanic Workers are Much Less Likely to be Able to Telework (Mar. 19, 2020), available at *https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/* (accessed Jan. 27, 2022)).

[231] With respect to immigrants specifically, unemployment data from August 2019 to August 2020 indicate that ''the observed increase in unemployment in the United States was twice as large among immigrants with at most a high-school

Continued

is aware that a significant portion of service industry work also is essential critical infrastructure work,[232] some of which DHS has previously prioritized for additional immigration flexibilities.[233] Participation in this kind of work frequently benefits the country, but also places such workers at greater risk for infection than those who work from home or in more socially distanced settings.

Finally, although DHS is unaware of vaccination data specific to citizenship and immigration status, there were disparities across racial and ethnic lines with respect to vaccination rates during the initial rollout of the nationwide vaccination campaign. For example, the percentage of fully vaccinated non-Hispanic Asians did not reach parity with non-Hispanic Whites until May 2, 2021, and the percentage of fully vaccinated Hispanics/Latinos did not reach parity with non-Hispanic Whites until September 23, 2021.[234] On January 12, 2022, the Kaiser Family Foundation reported that ''Over the course of the vaccination rollout, Black and Hispanic people have been less likely than their White counterparts to receive a vaccine, but these disparities have narrowed over time, particularly for Hispanic people.'' DHS emphasizes, however, that existing data contain limitations and may have been influenced by restrictions on vaccine eligibility related to age and other factors during the initial rollout.[235]

d. USCIS Response to COVID–19 and Public Charge

Commenters on the 2018 NPRM expressed concerns that the proposed rule would ''make immigrant families afraid to seek healthcare, including vaccinations against communicable diseases, and therefore, endanger the U.S. population.'' A commenter specifically provided the example of ''a novel influenza outbreak'' for which the ''critical first step'' of the government's response would ''be to get individuals access to healthcare'' and stated that even if such services qualified for a narrow exception, ''it would have a significant impact on the country's ability to protect and promote the public health.'' [236]

DHS responded to those concerns by noting that with the rule it did ''not intend to restrict the access of vaccines . . . or intend to discourage individuals from obtaining the necessary vaccines.'' [237] DHS also stated that many sources of vaccines through public benefits programs are not considered public benefits under (the now vacated) 8 CFR 212.21(b) [238] or would otherwise not be a negative factor in the totality of the circumstances determination.[239] In the 2019 Final Rule, DHS did not directly address the commenters' concerns that a loss of trust in government healthcare services might hamper the government's ability to respond to a novel disease outbreak.

However, USCIS did address such concerns in a limited way with the publication of USCIS Policy Manual (PM) content relating to the public charge ground of inadmissibility.[240] In PM Volume 8, Part G, Chapter 10—Public Benefits, USCIS provided a non-exhaustive list of benefits that are ''not considered public benefits in the public charge inadmissibility determination.'' [241] This list included ''public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.'' [242] The PM also noted that USCIS does not consider certain Medicaid benefits for purposes of the public charge inadmissibility determination, including ''benefits paid for an emergency medical condition.'' [243] USCIS published this guidance to its website on February 5, 2020.

On March 13, 2020, USCIS posted an alert box on its website regarding the 2019 Final Rule and COVID–19. The alert stated that

> USCIS will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID–19 as part of a public charge inadmissibility determination, nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status, even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (*e.g.* federally funded Medicaid).[244]

The alert did not explain how a person could enroll in Medicaid for the sole purpose of COVID–19-related care,[245] or cite a provision of the 2019 Final Rule specifically authorizing the exemptions described in the alert or the PM.

With respect to receipt of other public benefits covered by the 2019 Final Rule (such as non-COVID–19-related federally funded Medicaid, SNAP, and public housing benefits), the PM and alert did not offer flexibility beyond that implicit in the ''totality of the circumstances'' analysis. The alert stated that

> if an alien subject to the public charge ground of inadmissibility lives and works in a jurisdiction where disease prevention methods such as social distancing or quarantine are in place, or where the alien's employer, school, or university voluntarily shuts down operations to prevent the spread of COVID–19, the alien may submit a statement with his or her application for adjustment of status to explain how such methods or policies have affected the alien as relevant to the factors USCIS must consider in a public charge inadmissibility determination. For instance, if the alien is prevented from working or attending school and must rely on public benefits for the duration of the COVID–19 outbreak and recovery phase, the alien can provide an

degree than for their peers with higher degrees. In addition, differences by education level were less pronounced for the native-born.'' *See* Organisation for Economic Co-operation and Development, What is the impact of the COVID–19 pandemic on immigrants and their children? (Oct. 19, 2020), available at *http://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de/* (accessed Feb. 11, 2021).

[232] *See generally* Cybersecurity and Infrastructure Security Agency, Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID–19 Response (Aug. 10, 2021), available at *https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce* (accessed Jan. 27, 2022).

[233] *See, e.g.,* 85 FR 82291 (Dec. 18, 2020) (extension of temporary rule creating flexibilities with respect to certain H–2A temporary agricultural workers); 85 FR 51304 (Aug. 20, 2020) (first extension of temporary rule); 85 FR 21739 (Apr. 20, 2020) (initial temporary rule); *see also, e.g.,* 87 FR 4722 (Jan. 28, 2022) (similar flexibilities with respect to certain H–2B temporary non-agricultural workers); 86 FR 28198 (May 25, 2021) (same); 85 FR 28843 (May 14, 2020) (same).

[234] *See* CDC, Percent of People Receiving COVID–19 Vaccine by Race/Ethnicity and Date Administered, United States, *available at https://covid.cdc.gov/covid-data-tracker/#vaccination-demographics-trends* (accessed Feb. 10, 2022).

[235] *See* Kaiser Family Foundation, Latest Data on COVID–19 Vaccinations by Race/Ethnicity (Jan. 12, 2022), *https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/#* (accessed Jan. 27, 2022). *See also* CDC, Race/Ethnicity of People Fully Vaccinated, available at *https://covid.cdc.gov/covid-data-tracker/#vaccination-demographic* (accessed Feb. 10, 2022).

[236] *See* 84 FR 41292, 41384 (Aug. 14, 2019).

[237] *Ibid.*

[238] 84 FR 41292, 41501 (Aug. 14, 2019).

[239] *See* 84 FR 41292, 41385 (Aug. 14, 2019).

[240] *See* USCIS Policy Manual, Part G—Public Charge Ground of Inadmissibility (accessed Jan. 31, 2022). To find historical guidance, click on the ''Appendices'' tab.

[241] USCIS Policy Manual Volume 8, Part G—Public Charge Ground of Inadmissibility, Chapter 10—Public Benefits, available at *https://www.uscis.gov/policy-manual/volume-8-part-g-chapter-10.*

[242] *Ibid.*

[243] *Ibid.*

[244] *See* USCIS, Public Charge; Alert, available at *https://www.uscis.gov/archive/public-charge* (last Reviewed/updated Sep. 22, 2020).

[245] *Cf., e.g.,* 84 FR at 41380 (''DHS recognizes that Medicaid and CHIP benefits for children also provide for other services or funding for in school health services and serve as an important way to ensure that children receive the vaccines needed to protect public health and welfare.'').

explanation and relevant supporting documentation. To the extent relevant and credible, USCIS will take all such evidence into consideration in the totality of the alien's circumstances.

The alert did not provide any further detail regarding the weight that USCIS would afford the COVID–19-related mitigating circumstances in its public charge inadmissibility determinations or explain whether the existence of a general economic downturn might warrant similar special consideration.

D. Public Charge Bonds

If a noncitizen is determined to be inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), they may be admitted in the discretion of the Secretary, if otherwise admissible, upon the giving of a suitable and proper bond.[246] Public charge bonds are intended to ensure ''that the alien will not in the future become a public charge.'' [247]

Historically, bond provisions started with States requiring certain amounts to assure a noncitizen would not become a public charge.[248] Bond provisions were codified in Federal immigration laws in 1903.[249] Notwithstanding codification in 1903, the acceptance of a bond posting in consideration of a noncitizen's admission and to assure that they will not become a public charge apparently had its origin in Federal administrative practice earlier than this date. Beginning in 1893, immigration inspectors served on Boards of Special Inquiry that reviewed exclusion cases of noncitizens who were likely to become public charges because the noncitizens lacked funds or relatives or friends who could provide support.[250] In these cases, the Boards of Special Inquiry usually admitted the noncitizen if someone could post bond or one of the immigrant aid societies would accept responsibility for the noncitizen.[251]

The present language of section 213 of the INA, 8 U.S.C. 1183, has been in the law without essential variation since 1907.[252] Under section 21 of the Immigration Act of 1917, an immigration officer could admit a noncitizen if a suitable bond was posted. In 1970, Congress amended section 213 of the INA, 8 U.S.C. 1183, to permit the posting of cash received by the U.S. Department of the Treasury and to eliminate specific references to communicable diseases of public health significance.[253] At that time, Congress also added, without further explanation or consideration, the phrase that any sums or other security held to secure performance of the bond shall be returned ''except to the extent forfeited for violation of the terms thereof'' upon termination of the bond.[254] Subsequently, IIRIRA amended the provision when adding a parenthetical that clarified that a bond is provided in addition to, and not in lieu of, the Affidavit of Support Under Section 213A of the INA and the income deeming requirements under section 213A of the INA, 8 U.S.C. 1183a.[255] Regulations implementing the public charge bond were promulgated in 1964 and 1966,[256] and are currently found at 8 CFR 103.6 and 8 CFR 213.1.

The 1999 Interim Field Guidance explained the IIRIRA changes to the public charge bond statute and noted that officers can offer public charge bonds as they had done in the past, but did not detail procedures for public charge bonds.[257] In the 2019 Final Rule, DHS promulgated a detailed public charge bond framework that included provisions that USCIS, consistent with sections 103 and 213 of the INA, 8 U.S.C. 1103 and 1183, would offer a public charge bond to certain applicants for adjustment of status who are inadmissible only due to the likelihood of becoming a public charge and when a favorable exercise of discretion is warranted, based upon the totality of the applicant's facts and circumstances.[258] The 2019 Final Rule also included provisions regarding the minimum public charge bond amount, the circumstances under which a public charge bond would be cancelled, as well as established specific conditions under which a public charge bond would be breached.[259]

IV. DHS 2021 Inadmissibility on Public Charge ANPRM and Listening Sessions

On August 23, 2021, DHS published an ANPRM to seek broad public feedback on the public charge ground of inadmissibility to inform its development of a future regulatory proposal. The goal of the ANPRM was to help ensure that a future regulatory proposal would be fair, consistent with law, and informed by relevant data and evidence. The ANPRM identified key considerations associated with the public charge ground of inadmissibility. These considerations include how DHS should define the term ''public charge,'' which public benefits DHS should consider relevant to the public charge inadmissibility determination, and how DHS should assess the statutory minimum factors when determining whether a noncitizen is likely to become a public charge.

DHS welcomed input from individuals, organizations, government entities and agencies, and all other interested members of the public. DHS also provided notice of public virtual listening sessions on the public charge ground of inadmissibility and the ANPRM. USCIS held two public listening sessions, one specifically for the general public on September 14, 2021, and one for State, territorial, local, and Tribal benefits-granting agencies and nonprofit organization on October 5, 2021. DHS accepted written comments and related material through October 22, 2021.

DHS received a total of 195 public comments in response to the ANPRM. Of these, 181 were unique and applicable to the ANPRM. DHS received comments from advocacy groups, individuals, State and local governments, legal services providers, professional associations, and a variety

[246] *See* INA sec. 213, 8 U.S.C. 1183. *See* 8 CFR 103.6; *see also* 8 CFR 213.1.

[247] *See* INA sec. 213, 8 U.S.C. 1183; *Matter of Viado,* 19 I&N Dec. 252, 253 (BIA 1985).

[248] *See, e.g., Mayor, Aldermen & Commonalty of City of N.Y.* v. *Miln,* 36 U.S. 102 (1837) (upholding a New York statute that required vessel captains to provide certain biographical information about every passenger on the ship and further permitting the mayor to require the captain to provide a surety of not more than $300 for each noncitizen passenger to indemnify and hold harmless the government from all expenses incurred to financially support the person and the person's children); *see also* H.D. Johnson & W.C. Reddall, *History of Immigration* (Washington, 1856).

[249] *See* Immigration Act of 1903, ch. 1012, 32 Stat. 1213 (repealed by Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898, and Immigration Act of 1917, ch. 29, 39 Stat. 874).

[250] *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, which created the Office of the Superintendent of Immigration within the Treasury Department. The Superintendent oversaw a new corps of U.S. Immigrant Inspectors stationed at the country's principal ports of entry. *See* USCIS History and Genealogy, Origins of Federal Immigration Service, *https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service* (accessed June 4, 2021).

[251] *See* USCIS History and Genealogy, *Origins of Federal Immigration Service,* available at *https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service* (accessed June 4, 2021).

[252] *See* Act of February 20, 1907, ch. 1134, sec. 26, 34 Stat. 898, 907.

[253] *See* Public Law 91–313, 84 Stat. 413, 413 (1970); *see also* 116 Cong. Rec. S9957 (daily ed. June 26, 1970).

[254] *See* Public Law 91–313, 84 Stat. 413, 413 (1970).

[255] *See* Public Law 104–208, div. C, sec. 564(f), 110 Stat. 3009–546, 3009–684. Under 8 U.S.C. 1631, the sponsor's income and resources, as well as the income and resources of the sponsor's spouse, is counted as the sponsored alien's income for the purposes of determining eligibility for any Federal means-tested public benefits.

[256] *See Miscellaneous Amendments to Chapter,* 29 FR 10579 (July 30, 1964); *see also Miscellaneous Edits to Chapter,* 31 FR 11713 (Sept. 7, 1966).

[257] *See* 64 FR 28689 (May 26, 1999).

[258] *See* 84 FR 41292, 41595 (Aug. 14, 2019).

[259] *See* 84 FR 41292, 41299 (Aug. 14, 2019).

of other groups. The slight majority of all unique submissions were provided by organizations. Commenter types included:

Table 4: Tallies by Commenter Type	
Commenter Type	Count of Unique Submissions
Advocacy Group	37
Individual	36
Anonymous	27
State or Local Government	18
Legal Services Provider	12
Professional Association	10
Healthcare Provider	8
Joint Submission	8
Religious/Community/Social Organization	6
Research Institute/Organization	5
Trade or Business Association	4
State or Local Elected Official (State Representative/Senator)	3
Academic/Researcher	2
Law firm (when representing itself)	2
School/University	2
Employer/Company	1
Total	**181**

While commenters provided thoughtful responses relating to most topics raised by DHS in the ANPRM, the 10 topics with the most comments were:

Table 5: ANPRM Topics with the Most Comments	
Topic	Count of Unique Submissions
Which public benefits should or should not be considered as a part of a public charge inadmissibility determination?	83
How should DHS address the possibility that individuals may choose to forgo the receipt of public benefits as a result of the public charge inadmissibility determination?	67
How should DHS define "public charge"?	63
The impacts or costs of previous rulemaking and policy in this area unrelated to a specific type of public benefit	59
Elements of the vacated 2019 Final Rule that commenters thought should be included or excluded in a future public charge rule	47
The Affidavit of Support, generally	40
Which factors are most predictive of whether a noncitizen is likely (or is not likely) to become a public charge?	37
How DHS could address potential unfairness or discrimination in public charge inadmissibility determinations	32
If and how DHS should consider disabilities or chronic health conditions in its evaluation of the health factor	28
Elements of the 1999 Interim Field Guidance that commenters thought should be included or excluded in a future public charge rule	25

Approximately 250 individuals or groups participated in the September 14, 2021,[260] listening session and approximately 210 participated in the October 5, 2021, session.[261] Among the topics raised by participants were the following:

- Disenrollment effects associated with the 2019 Final Rule and how to reduce potential disenrollment effects in future rulemaking through policy choices and communication strategy;
- The definition of public charge and which public benefits, if any, are relevant to that definition;
- How DHS should apply the health factor, particularly for noncitizens who may have disabilities;
- Better communication concerning which populations of noncitizens are subject to the public charge ground of inadmissibility;
- Consistency between DOS and DHS approaches to public charge inadmissibility;
- The totality of the circumstances approach to public charge inadmissibility determinations;
- Concerns relating to the heavy burden of information collection and required evidence associated with the 2019 Final Rule; and
- Consideration of a sufficient Affidavit of Support Under Section 213A of the INA in a public charge inadmissibility determination.

Many individuals and organizations who provided feedback during the listening sessions stated that they also provided written comments with more detailed and comprehensive suggestions for DHS's consideration.

DHS thanks all of those individuals and organizations who participated in the listening sessions or provided public comments. DHS has reviewed all of the comments and considered them in developing this proposed rule. Where relevant, DHS has referenced comments received in response to the ANPRM in the preamble to this proposed rule.

V. Discussion of Proposed Rule

A. Introduction

In drafting this proposed rule, DHS seeks to articulate a policy that would be fully consistent with law; that would reflect empirical evidence to the extent relevant and available, and allow flexibility for adjudicators to benefit from the emergence of new evidence as time passes; that would carefully consider public comments; that would be clear, fair, and comprehensible for officers as well as for noncitizens and their families; that would lead to fair and consistent adjudications and, thus, avoid unequal treatment of similarly situated individuals; and would not otherwise unduly impose barriers for noncitizens seeking admission or adjustment of status in the United States.[262] DHS also seeks to ensure that its regulatory proposal would not unduly interfere with the receipt of public benefits, in particular by those who are not subject to the public charge ground of inadmissibility.

B. Applicability

This proposed rule interprets the public charge inadmissibility ground under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and only with respect to public charge inadmissibility determinations made by DHS. This proposed rule would apply to any noncitizen subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), who is applying for adjustment of status to that of a lawful permanent resident before USCIS or is applying for admission before U.S. Customs and Border Protection (CBP) at a port of entry as part of the inspection process.[263]

However, this proposed rule does not propose to address public charge inadmissibility determinations under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), or public charge deportability determinations under section 237(a)(5) of the INA, 8 U.S.C. 1227(a)(5), made by DOJ in the course of removal proceedings under section 240 of the INA, 8 U.S.C. 1229a.

Furthermore, this proposed rule does not address public charge inadmissibility determinations made by DOS when noncitizens apply for visas with DOS.[264]

1. Applicants for Admission

Applicants for admission are inspected at, or when encountered between, ports of entry. They are inspected by immigration officers to assess, among other things, whether they are inadmissible under section 212(a) of the INA, 8 U.S.C. 1182(a), including section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

a. Nonimmigrants

Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), any noncitizen who is applying for a visa or for admission to the United States as a nonimmigrant is inadmissible if they are likely at any time to become a public charge. A noncitizen applies directly to a U.S. consulate or embassy abroad for a nonimmigrant visa to travel to the United States temporarily for a limited purpose, such as to visit for business or tourism.[265] As noted above, this proposed rule does not address public charge ineligibility determinations made by DOS. Instead, DOS consular officers assess whether the noncitizen is ineligible for a visa, including under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), as applicable.

Once DOS issues the nonimmigrant visa, the noncitizen generally may travel to the United States using that visa and apply for admission at a port of entry. CBP determines whether the applicant for admission is inadmissible under any ground, including section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). This proposed rule applies to CBP's public charge inadmissibility determinations.[266]

b. Immigrants

A noncitizen who is the beneficiary of an immigrant visa petition approved by USCIS may apply to a DOS consulate or embassy abroad for an immigrant visa to allow them to seek admission to the United States as an immigrant.[267] As part of the immigrant visa process, DOS determines whether the applicant is eligible for the visa, which includes a determination of whether the noncitizen has demonstrated that they are admissible to the United States and that no inadmissibility grounds in section 212(a) of the INA, 8 U.S.C. 1182(a), apply. In determining whether the applicant has demonstrated that they are not inadmissible on the public charge ground, DOS reviews all of the mandatory factors, including any required Affidavit of Support Under Section 213A of the INA as set forth in their regulations and guidance.[268] This

[260] *See* Listening Session I Transcript.

[261] *See* Listening Session II Transcript.

[262] *See* Executive Order 14012 (Restoring Faith in Our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans), 86 FR 8277 (published Feb. 5, 2021).

[263] *See* proposed 8 CFR 212.20 through 212.23.

[264] DOS reopened the comment period for 60 days on their preliminarily enjoined interim final rule addressing ineligibility on public charge grounds. The comment period closed on January 18, 2022. See, *Visas: Ineligibility Based on Public Charge Grounds,* interim final rule; reopening of public comment period, 86 FR 64070 (Nov. 17, 2021).

[265] Certain nonimmigrant classifications are subject to petition requirements, and in such cases a petition generally must be approved on a noncitizen's behalf by USCIS prior to application for a visa. *See, e.g.,* INA sec. 214(c), 8 U.S.C. 1184(c). In addition, certain noncitizens are not subject to a visa requirement in order to seek admission as a nonimmigrant. *See, e.g.,* INA sec. 217, 8 U.S.C. 1187; *see also* 8 CFR 212.1.

[266] *See* INA secs. 221 and 222, 8 U.S.C. 1201 and 1202; 8 CFR 204.

[267] *See* INA secs. 221 and 222, 8 U.S.C. 1201 and 1202; 8 CFR 204; 22 CFR part 42.

[268] 22 CFR 40.41; 9 FAM 302.8.

proposed rule will not address public charge inadmissibility determinations made by DOS.[269]

Once DOS issues the immigrant visa, the noncitizen typically can travel to the United States and apply for admission as an immigrant at a port of entry. CBP determines whether the applicant for admission as an immigrant is inadmissible under any ground, including section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). This proposed rule applies to these public charge inadmissibility determinations made by CBP.

c. Certain Lawful Permanent Residents Returning to the United States

Lawful permanent residents generally are not considered to be applicants for admission, and therefore are not subject to inadmissibility determinations upon their return from a trip abroad. However, in certain limited circumstances, a lawful permanent resident will be considered an applicant for admission and, therefore, subject to an inadmissibility determination upon the lawful permanent resident's return to the United States.[270] This inadmissibility determination includes whether the noncitizen is inadmissible as likely at any time to become a public charge.

2. Adjustment of Status Applicants

In general, a noncitizen who is physically present in the United States may be eligible to apply for adjustment of status before USCIS to that of a lawful permanent resident if the applicant was inspected and admitted or paroled, is eligible to receive an immigrant visa, is admissible to the United States, and has an immigrant visa immediately available at the time of filing the adjustment of status application.[271] As part of the adjustment of status process, USCIS is responsible for determining whether the applicant has met their burden of proof to establish eligibility for the benefit,[272] which includes a determination of whether the applicant has demonstrated that no inadmissibility grounds in section 212(a) of the INA, 8 U.S.C. 1182(a), apply (or, if they do apply, that the noncitizen is eligible for a waiver of the inadmissibility ground or other form of relief). In determining whether the adjustment of status applicant has demonstrated that they are not inadmissible on the public charge ground, DHS proposes to review the mandatory statutory factors together with any required Affidavit of Support Under Section 213A of the INA and other relevant information, in the totality of the circumstances.

3. Rule Does Not Address Extension of Stay/Change of Status

DHS permits certain nonimmigrants to remain in the United States beyond their authorized period of stay to continue engaging in activities permitted under their current nonimmigrant status.

The extension of stay (EOS) regulations require that the individual filing the application or petition for EOS demonstrate that the nonimmigrant is admissible to the United States (*i.e.,* generally, is not inadmissible under any ground under section 212(a) of the INA, 8 U.S.C. 1182(a)), or that any applicable inadmissibility ground has been waived.[273] Although many of the inadmissibility grounds in section 212(a) of the INA, 8 U.S.C. 1182(a), apply to applications and petitions for EOS, section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), does not apply because it only applies to applicants for visas, admission, and adjustment of status. An applicant for or beneficiary of an application or petition for EOS is neither an applicant for a visa, admission, or adjustment of status. The decision to grant an EOS application, with certain limited exceptions, is discretionary,[274] however, and DHS has the authority to set conditions in determining whether to grant the EOS application or petition.[275]

Additionally, under section 248 of the INA, 8 U.S.C. 1258, DHS may permit change of status (COS) from one nonimmigrant classification to another classification, with certain exceptions, as long as the nonimmigrant is continuing to maintain their current nonimmigrant status and is not inadmissible under section 212(a)(9)(B)(i) of the INA, 8 U.S.C. 1182(a)(9)(B)(i).[276] Like EOS, COS applications and petitions are not subject to the public charge ground of inadmissibility and therefore, public charge inadmissibility will not render an individual ineligible for COS under the statute. Additionally, as with EOS, COS is a discretionary determination, and DHS has the authority to set conditions that apply for a nonimmigrant to change their status.[277]

Neither the 1999 Interim Field Guidance nor the 1999 NPRM addressed EOS or COS. However, in the 2019 Final Rule (that is no longer in effect), DHS required individuals who sought EOS and COS to establish that they had not received one or more public benefits for more than 12 months in the aggregate within any 36-month period since obtaining the nonimmigrant status they sought to extend or from which they sought to change and through adjudication.[278] In that rule, DHS wrote that its policy of imposing public benefit conditions on EOS and COS applications and petitions was within DHS's authority pursuant to sections 214 and 248 of the INA, 8 U.S.C. 1184 and 1258, to regulate conditions and periods of admission of nonimmigrants and conditions for COS, respectively, and consistent with the PRWORA policy statement described above.[279] In setting the public charge condition in the 2019 Final Rule, DHS noted that it was reasonable to require, as a condition of obtaining EOS or COS, evidence that nonimmigrants inside the United States have not received public benefits during their nonimmigrant stay ''given DHS's authority to set conditions [on EOS and COS]'' [280] and the government's ''interest in ensuring that aliens present in the United States do not depend on public benefits to meet their needs.'' [281]

[269] On October 11, 2019, DOS published an interim final rule (''IFR'') regarding visa ineligibility on public charge grounds and accepted public comments on the rule through November 19, 2019. Given the changed circumstances since publication of that IFR, on November 17, 2021, DOS reopened the public comment period for an additional 60 days to seek additional comments regarding whether the IFR should be rescinded or revised, and what final rule should ultimately be adopted, if any, regarding the public charge ground of inadmissibility. Therefore, it is possible that DOS will amend its regulations and guidance.

[270] Individuals who have been lawfully admitted for permanent residence are regarded as applicants for admission in the following circumstances: (1) The individual has abandoned or relinquished that status; (2) the individual has been outside the United States for a continuous period in excess of 180 days; (3) the individual has engaged in illegal activity after departing the United States; (4) the individual has departed the United States while under legal process seeking removal of the noncitizen from the United States, including removal proceedings and extradition proceedings; (5) the individual has committed an offense identified in section 212(a)(2) of the INA, 8 U.S.C. 1182(a)(2), unless granted a waiver of inadmissibility for such offense or cancellation of removal; and (6) the individual has attempted to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer. *See* INA sec. 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

[271] *See* INA sec. 245, 8 U.S.C. 1255. Noncitizens in removal proceedings before an immigration judge may also apply for adjustment of status pursuant to 8 CFR 1245.

[272] *See* INA sec. 291, 8 U.S.C. 1361.

[273] *See* 8 CFR 214.1(a)(3)(i).

[274] *See* 8 CFR 214.1(c)(5).

[275] *See generally* INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1); 8 CFR 214.1(a)(3)(i).

[276] *See* INA sec. 248(a), 8 U.S.C. 1258(a); 8 CFR 248.1(a).

[277] *See* INA sec. 248(a), 8 U.S.C. 1258(a).

[278] *See* 84 FR 41292 (Aug. 14, 2019).

[279] *See* 84 FR 41292, 41330 (Aug. 14, 2019); 83 FR 51114, 51135–36 (Oct. 10, 2018).

[280] *See* 84 FR 41292, 41329 (Aug. 14, 2019).

[281] *See* 83 FR 51114, 51135 (Oct. 10, 2018).

Although DHS indeed has the authority to set conditions on both EOS and COS applications and petitions, for the purposes of this NPRM, DHS does not propose any conditions on such applications and petitions based on receipt of public benefits. DHS no longer believes that it needs an additional condition to ensure that nonimmigrants present in the United States do not depend on public benefits, in part because nonimmigrants are generally barred from receiving many of the public benefits considered in this proposed rule, *e.g.,* SSI and TANF, and Medicaid for long-term institutionalization. In addition, a number of nonimmigrant classifications are employment-based and entail nonimmigrants being paid to perform services or labor in the United States.[282] Others nonimmigrants, such as F nonimmigrant students, must have sufficient funds available for self-support during the entire proposed course of study.[283] Additionally, DHS agrees with commenters during the 2018–2019 public charge rulemaking that the public charge inadmissibility determination that nonimmigrants undergo at the time of visa issuance and when applying for admission as nonimmigrants at the port of entry,[284] as mandated by Congress, sufficiently addresses the assessment of whether such nonimmigrants are likely to receive public benefits. DHS also believes that imposing the public benefit condition on EOS and COS would impose unnecessary burdens on applicants, petitioners, and adjudicators. Finally, consistent with statements made by commenters in response to the 2018 NPRM, DHS believes it appropriate to refrain from adding a public benefit condition to applications and petitions for EOS and COS, as this will avoid discouraging international students and scholars from applying for post-secondary education in the United States.[285] Accordingly, DHS is not proposing to consider receipt of any public benefits in adjudicating applications and petitions for EOS and COS.

4. Summary Tables

Tables 6 through 10 below provide a summary of immigrant categories for adjustment of status and the applicability of the public charge inadmissibility determination to such categories.

[282] *See, e.g.,* H, L, O, P nonimmigrant classifications, *Special requirements for admission, extension, and maintenance of status,* 8 CFR 214.2(h), (l), (o), (p).

[283] *See* 8 CFR 214.2(f)(1)(B), 22 CFR 41.61(b)(1)(ii). *See also* USCIS; Students and Employment, *https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment* (accessed Feb. 10, 2022).

[284] *See* 84 FR 41292 (Aug. 14, 2019).

[285] *See* 84 FR 41292, 41330–41331 (Aug. 14, 2019).

TABLE 6—APPLICABILITY OF INA SEC. 212(a)(4) TO FAMILY-BASED ADJUSTMENT OF STATUS APPLICATIONS [286]

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A and Affidavit of Support under section 213A of the INA (Form I–864)—required or exempt? [287]
Immediate Relatives of U.S. citizens, including spouses, children, and parents [288].	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C).
Unmarried sons and daughters of U.S. citizens and their children (family-sponsored 1st preference) [289].	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C).
Spouses, children, and unmarried sons and daughters of noncitizen residents (family-sponsored 2nd preference) [290].	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C).
Married sons and daughters of U.S. citizens and their spouses and children (family-sponsored 3rd preference) [291].	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C).
Brothers and sisters of U.S. citizens (at least 21 years of age) and their spouses and children (family-sponsored 4th preference) [292].	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C).
Fiancés of U.S. citizens (admitted as a K–1 or K–2 nonimmigrant) [293].	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C).
Amerasians based on preference category, born between December 31, 1950, and October 22, 1982 [294].	Yes, per INA sec. 212(a)(4)(A)	Exempt, per Amerasian Act, Public Law 97–359 (Oct. 22, 1982).
Amerasians, born in Vietnam between January 1, 1962, and January 1, 1976. Immediate Relative: AM–6, AR–6 Children Amerasians under Amerasian Homecoming Act, Public Law 100–202 (Dec. 22, 1987) [295] born between January 1, 1962, and January 1, 1976.	No. (Form I–360 and adjustment of status) Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202.	Exempt, per section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202.
Spouses, widows, or widowers of U.S. citizens (IW–6)	Yes, per INA sec. 212(a)(4)	Exempt, per 8 CFR 204.2 and 71 FR 35732 (June 21, 2006).
Immediate relative VAWA applicants, including spouses and children [296].	No, per INA sec. 212(a)(4)(E) and INA sec. 212(a)(4)(C)(i).	Exempt, per INA sec. 212(a)(4)(E).
1st preference VAWA applicants, including B–16 Unmarried sons/daughters of U.S. citizens, self-petitioning B–17 Children of B–16.	No, per INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(C)(i).
2nd preference VAWA applicants, including spouses and children [297].	No, per INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(C)(i).
3rd Preference VAWA Married son/daughters of U.S. citizen, including spouses and children [298].	No, per INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(C)(i).

TABLE 7—APPLICABILITY OF INA SEC. 212(a)(4) TO EMPLOYMENT-BASED ADJUSTMENT OF STATUS APPLICATIONS

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I–864, Affidavit of Support under section 213A of the INA, required or exempt?
First Preference: Priority workers [299]	Yes, in general,[300] per INA sec. 212(a)(4).	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5 percent or more) [301] in filed Form I–140, per INA sec. 212(a)(4)(D) and 8 CFR 213a.
Second Preference: Professionals with advanced degrees or noncitizens of exceptional ability.	Yes, in general,[302] per INA sec. 212(a)(4).	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5 percent or more) in filed Form I–140, per INA sec. 212(a)(4)(D) and 8 CFR 213a.
Third preference: Skilled workers, professionals, and other workers [303].	Yes, in general,[304] per INA sec. 212(a)(4).	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5 percent or more) in filed Form I–140, per INA sec. 212(a)(4)(D) and 8 CFR 213a.
Fifth preference: Investors [305]	Yes, per INA sec. 212(a)(4)	Not applicable.[306]

TABLE 8—APPLICABILITY OF INA SEC. 212(A)(4) TO SPECIAL IMMIGRANT ADJUSTMENT OF STATUS APPLICATIONS

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I–864, Affidavit of Support under section 213A of the INA, required or exempt?
Religious Workers [307]	Yes, per INA sec. 212(a)(4)	Not applicable.[308]
International employees of U.S. government abroad [309]	Yes, per INA sec. 212(a)(4)	Not applicable.[310]
Employees of Panama Canal [311]	Yes, per INA sec. 212(a)(4)	Not applicable.[312]
Foreign Medical School Graduates [313]	Yes, per INA sec. 212(a)(4)	Not applicable.[314]
Retired employees of International Organizations, including G–4 International Organization Officer [315]. International Organizations (G–4s international organization officer/Retired G–4 Employee) [316].	Yes, per INA sec. 212(a)(4)	Not applicable.[317]
SL–6 Juvenile court dependents	No, per INA sec. 245(h)	Not applicable, per INA sec. 245(h)
U.S. Armed Forces Personnel [318]	Yes, per INA sec. 212(a)(4)	Not Applicable.[319]
International Broadcasters [320]	Yes, per INA sec. 212(a)(4)	Not Applicable.[321]

TABLE 8—APPLICABILITY OF INA SEC. 212(A)(4) TO SPECIAL IMMIGRANT ADJUSTMENT OF STATUS APPLICATIONS—Continued

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I–864, Affidavit of Support under section 213A of the INA, required or exempt?
Special immigrant interpreters who are nationals of Iraq or Afghanistan [322].	No, per section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006, as amended, Public Law 109–162 (Jan. 6, 2005), section 1244(a)(3) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Public Law 110–181 (Jan. 28, 2008), section 602(b) of the Afghan Allies Protection Act of 2009, as amended, Public Law 111–8 (Mar. 11, 2009).	Exempt, per section 602(b)(9) of the Afghan Allies Protection Act of 2009, title VI of Public Law 111–8, 123 Stat. 807, 809 (Mar. 11, 2009).[323]

TABLE 9—APPLICABILITY OF INA SEC. 212(a)(4) TO REFUGEE, ASYLEE, AND PAROLEE ADJUSTMENT OF STATUS APPLICATIONS

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I–864, Affidavit of Support under section 213A of the INA, required or exempt?
Asylees [324]	No, per INA sec. 209(c)	Exempt, per INA sec. 209(c).
Indochinese Parolees from Vietnam, Cambodia, and Laos IC–6 Indochinese refugees (Pub. L. 95–145 of 1977) IC–7 Spouses or children of Indochinese refugees not qualified as refugees on their own.	No, per section 586 of Public Law 106–429 (Nov. 6, 2000).	Exempt, per section 586 of Public Law 106–429 (Nov. 6, 2000).
Polish and Hungarian Parolees (Nationals of Poland or Hungary who were paroled into the United States from November 1, 1989, to December 31, 1991) [325].	No, per title VI, subtitle D, section 646(b), Public Law 104–208 (Sept. 30, 1996); 8 CFR 245.12.	Exempt, per title VI, subtitle D, section 646(b), Public Law 104–208 (Sept. 30, 1996); 8 CFR 245.12.
Refugees [326]	No, per INA sec. 207(c)(3) and INA sec. 209(c).	Exempt, per INA sec. 207 and INA sec. 209(c).
Cuban-Haitian Entrant under IRCA [327]	No, per section 202 of Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986) (as amended), 8 U.S.C. 1255a.	Exempt, per section 202 of Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986) (as amended), 8 U.S.C. 1255a.
HRIFA: Principal HRIFA Applicant who applied for asylum before December 31, 1995 [328].	No, per section 902 of Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.	Exempt, per section 902 of Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.

TABLE 10—APPLICABILITY OF INA SEC. 212(a)(4) TO OTHER APPLICANTS

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I–864, Affidavit of Support under section 213A of the INA, required or exempt?
Diplomats Section 13	Yes, per Section 13 of Public Law 85–316 (Sept. 11, 1957), as amended by Public Law 97–116 (Dec. 29, 1981); 8 CFR 245.3.	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I–864.
Persons Born in the United States under Diplomatic Status (NA–3), as described in 8 CFR 101.3.	Yes, per INA sec. 212(a)(4)	Exempt, per 8 CFR 101.3.
Diversity immigrant, spouse, and child [329]	Yes, per INA sec. 212(a)(4)	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I–864.[330]
Certain entrants before January 1, 1982 [331]	Yes, per INA sec. 212(a)(4), INA sec. 245A(b)(1)(C)(i), and INA sec. 245A(a)(4)(A) [332].	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I–864.
T-nonimmigrants	No, per INA sec. 212(a)(4)(E)	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I–864.[333]
Certain American Indians born in Canada	No, per INA sec. 289	Exempt, per INA sec. 289.
Certain Syrian asylees adjusting under Public Law 106–378	No, per former 8 CFR 245.20(c) (2011) [334].	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I–864.
Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983).	No, per Public Law 97–429 (Jan. 8, 1983).	Exempt, per Public Law 97–429 (Jan. 8, 1983).
S (noncitizen witness or informant)	Yes, per INA sec. 212(a)(4) [335]	Exempt, per INA sec. 245(j); INA sec. 101(a)(15)(S); 8 CFR 214.2(t)(2); 8 CFR 1245.11.
Private Immigration Bill providing for noncitizen's adjustment of status.	Dependent on the text of the Private Bill	Dependent on the text of the Private Bill.
Nicaraguan Adjustment and Central American Relief Act (NACARA) sec. 202 [336].	No, per section 202(a) of Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255.	Exempt, per section 202(a) of Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255.
NACARA sec. 203 [337]	No, per section 203 of Public Law 105–11, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255.	Exempt, per section 203 of Public Law 105–11, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255.
Lautenberg, LA–6 [338]	No, per section 599E of Public Law 101–167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255.	Exempt, per section 599E of Public Law 101–167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255.
Registry, Z–66: Noncitizens who entered the United States prior to January 1, 1972, and who meet the other conditions.	No, per INA sec. 249 and 8 CFR part 249.	Exempt, per INA sec. 249 and 8 CFR part 249.
U–1 Crime Victim, spouse, children and parents, and siblings under INA sec. 245(m).	No, per INA sec. 212(a)(4)(E)	Exempt, per INA sec. 212(a)(4)(E).

TABLE 10—APPLICABILITY OF INA SEC. 212(a)(4) TO OTHER APPLICANTS—Continued

Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I–864, Affidavit of Support under section 213A of the INA, required or exempt?
Temporary Protected Status (TPS)	No, per 8 CFR 244.3(a) [339]	Exempt, per 8 CFR 244.3(a).[340]
Liberian Refugee Immigration Fairness (LRIF) [341]	No, per section 7611(b)(2) of the National Defense Authorization Act (NDAA) 2020, Public Law 116–92, 113 Stat. 1198, 2310 (Dec. 20, 2019).	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I–864 [342]

[286] Applicants who filed a Form I–485 before December 19, 1997, are exempt from the Affidavit of Support requirement. *See* Section 531(b) of Div. C of Public Law 104–208, 110 Stat. 3009–546, 3009–675 (September 30, 1996). *See* 8 CFR 213a.2(a)(2)(i) (adjustment applicants) and 8 CFR 213a.2(a)(2)(ii)(B) (applicants for admission). Noncitizens who acquired citizenship under section 320 of the INA, 8 U.S.C. 1431, upon admission to the United States are exempt from submitting an affidavit of support, and files Form I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support. *See* 8 CFR 213a.2(a)(2)(ii)(E). *See* Section 101 of the Child Citizenship Act, Public Law 106–395, 114 Stat. 1631, 1631 (October 30, 2000) (amending section 320 of the INA, 8 U.S.C. 1431). In addition, the surviving spouses, children, and parents of a deceased member of the military who obtain citizenship posthumously are exempt from a public charge determination. *See* Section 1703(e) of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108–136, 117 Stat. 1392, 1695 (November 24, 2003).

[287] Some categories of adjustment of status applicants are exempt from the Affidavit of Support requirement, but submit Form I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support, with their adjustment of status application to establish that a Form I–864 is not required in their case. These categories include children of U.S. citizens who will automatically become U.S. citizens under the Child Citizenship Act of 2000 upon their admission to the United States, self-petitioning widows and widowers of U.S. citizens, and self-petitioning battered spouses and children. Applicants who have earned (or can be credited with) 40 quarters (credits) of coverage under the Social Security Act (SSA) may also file Form I–864W to establish that a Form I–864 is not required in their case.

[288] Includes the following categories: IR–6 Spouses; IR–7 Children; CR–7 Children, conditional; IH–8 Children adopted abroad under the Hague Adoption Convention; IH–9 Children coming to the United States to be adopted under the Hague Adoption Convention; IR–8 Orphans adopted abroad; IR–9 Orphans coming to the United States to be adopted; IR–0 Parents of adult U.S. citizens. Children adopted abroad generally do not apply for adjustment of status.

[289] Includes the following categories: A–16 Unmarried Amerasian sons/daughters of U.S. citizens; F–16 Unmarried sons/daughters of U.S. citizens; A–17 Children of A–11 or A–16; F–17 Children of F–11 or F–16; B–17 Children of B–11 or B–16.

[290] Includes the following categories: F–26 Spouses of noncitizen residents, subject to country limits; C–26 Spouses of noncitizen residents, subject to country limits, conditional; FX–6 Spouses of noncitizen residents, exempt from country limits; CX–6 Spouses of noncitizen residents, exempt from country limits, conditional; F–27 Children of noncitizen residents, subject to country limits; C–28 Children of C–26, or C–27, subject to country limits, conditional; B–28 Children of B–26, or B–27, subject to country limits; F–28 Children of F–26, or F–27, subject to country limits; C–20 Children of C–29, subject to country limits, conditional; B–20 Children of B–29, subject to country limits; F–20 Children of F–29, subject to country limits; C–27 Children of noncitizen residents, subject to country limits, conditional; FX–7 Children of noncitizen residents, exempt from country limits; CX–8 Children of CX7, exempt from country limits, conditional; FX–8 Children of FX–7, or FX–8, exempt from country limits; CX–7 Children of noncitizen residents, exempt from country limits, conditional; F–29 Unmarried sons/daughters of noncitizen residents, subject to country limits; C–29 Unmarried children of noncitizen residents, subject to country limits, conditional.

[291] Includes the following categories: A–36 Married Amerasian sons/daughters of U.S. citizens; F–36 Married sons/daughters of U.S. citizens; C–36 Married sons/daughters of U.S. citizens, conditional; A–37 Spouses of A–31 or A–36; F–37 Spouses of married sons/daughters of U.S. citizens; C–37 Spouses of married sons/daughters of U.S. citizens, conditional; B–37 Spouses of B–31 or B–36; A–38 Children of A–31 or A–36, subject to country limits; F–38 Children of married sons/daughters of U.S. citizens; C–38 Children of C–31 or C–36, subject to country limits, conditional; B–38 Children of B–31 or B–36, subject to country limits.

[292] Includes the following categories: F–46 Brothers/sisters of U.S. citizens, adjustments; F–47 Spouses of brothers/sisters of U.S. citizens, adjustments; F–48 Children of brothers/sisters of U.S. citizens.

[293] Includes the following categories: CF–1 Spouses, entered as fiancé(e), adjustments conditional; IF–1 Spouses, entered as fiancé(e).

[294] Includes the following categories: Immediate Relative AR–6 Children, Amerasian, First Preference: A–16 Unmarried Amerasian sons/daughters of U.S. citizens; Third Preference A–36 Married Amerasian sons/daughters of U.S. citizens. *See* section 204(f) of the INA, 8 U.S.C. 1154(f). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[295] Includes the following categories: AM–1 principal (born between 1/1/1962–1/1/1976); AM–2 Spouse, AM–3 child; AR–1 child of U.S. citizen born Cambodia, Korea, Laos, Thailand, Vietnam. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[296] Includes the following categories: IB–6 Spouses, self-petitioning; IB–7 Children, self-petitioning; IB–8 Children of IB–1 or IB–6; IB–0 Parents battered or abused, of U.S. citizens, self-petitioning.

[297] Includes the following categories: B–26 Spouses of noncitizen residents, subject to country limits, self-petitioning; BX–6 Spouses of noncitizen residents, exempt from country limits, self-petitioning; B–27 Children of noncitizen residents, subject to country limits, self-petitioning; BX–7 Children of noncitizen residents, exempt from country limits, self-petitioning; BX–8 Children of BX–6, or BX–7, exempt from country limits; B–29 Unmarried sons/daughters of noncitizen residents, subject to country limits, self-petitioning.

[298] Includes the following categories: Third Preference VAWA; B–36 Married sons/daughters of U.S. citizens, self-petitioning; B–37 Spouses of B–36, adjustments; B–38 Children of B–36, subject to country limits.

[299] Includes the following categories: E–16 Immigrants with extraordinary ability; E–17 Outstanding professors or researchers; E–18 Certain Multinational executives or managers; E–19 Spouses of E–11, E–12, E–13, E–16, E–17, or E18; E–10 Children of E–11, E–12, E–13, E–16, E–17, or E–18.

[300] If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I–485, also falls under a category exempted under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E) (for example, T nonimmigrants, U nonimmigrants, and VAWA self-petitioners), the applicant is not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4) (but is still required to file Form I–864). *See* 8 CFR 213a.2(b)(2).

[301] Relative means a husband, wife, father, mother, child, adult son, adult daughter, brother, or sister. Significant ownership interest means an ownership interest of five percent or more in a for-profit entity that filed an immigrant visa petition to accord a prospective employee an immigrant status under section 203(b) of the INA, 8 U.S.C. 1153(b). *See* 8 CFR 213a.1.

[302] If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (five percent or more), and the applicant, at both the time of filing and adjudication of the Form I–485, also falls under a category exempted under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E) (for example, T nonimmigrants, U nonimmigrants, and VAWA self-petitioners), the applicant is not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4) (but is still required to file Form I–864). *See* 8 CFR 213a.2(b)(2).

[303] Includes the following categories: EX–6 Schedule A worker; EX–7 Spouses of EX–6; EX–8 Children of EX–6; E–36 Skilled workers; E–37 Professionals with baccalaureate degrees; E–39 Spouses of E–36, or E–37; E–30 Children of E36, or E–37; EW–8 Other workers; EW–0 Children of EW–8; EW–9 Spouses of EW–8; EC–6 Chinese Student Protection Act (CSPA) principals; EC–7 Spouses of EC–6; EC–8 Children of EC–6.

[304] If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I–485, also falls under a category exempted under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E) (for example, T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) the applicant is not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4) (but is still required to file Form I–864). *See* 8 CFR 213a.2(b)(2).

[305] Includes the following categories: C–56 Employment creation, not in targeted area, adjustments, conditional E–56 Employment creation; I–56 Employment creation, targeted area, pilot program, adjustments, conditional; T–56

Employment creation, targeted area, conditional; R–56 Investor pilot program, not targeted, conditional; C–57 Spouses of C–51 or C–56, conditional; E–57 Spouses of E–51 or E–56; I–57 Spouses of I–51 or I–56, conditional; T–57 Spouses of T–51 or T–56, conditional; R–57 Spouses of R–51 or R–56, conditional; C–58 Children of C–51 or C–56, conditional; E–58 Children of E–51 or E–56; I–58 Children of I–51 or I–56, conditional; T–58 Children of T–51 or T–56, conditional; R–58 Children of R–51 or R–56, conditional.

[306] Fifth preference employment-based applicants are Immigrant Petition by Alien Entrepreneur (Form I–526) self-petitioners. The regulation at 8 CFR 213a.1 relates to a person having ownership interest in an entity filing for a prospective employee and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D) is inapplicable.

[307] Includes the following categories: SD–6 Ministers; SD–7 Spouses of SD–6; SD–8 Children of SD–6; SR–6 Religious workers; SR–7 Spouses of SR–6; SR–8 Children of SR–6.

[308] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers (for example, a religious institution), would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirement for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D) generally is inapplicable.

[309] Includes the following categories: SE–6 Employees of U.S. government abroad, adjustments; SE–7 Spouses of SE–6; SE–8 Children of SE–6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[310] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers (for example, the U.S. Armed Forces), would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirement for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

[311] Includes the following categories: SF–6 Former employees of the Panama Canal Company or Canal Zone Government; SF–7 Spouses or children of SF–6; SG–6 Former U.S. government employees in the Panama Canal Zone; SG–7 Spouses or children of SG–6; SH–6 Former employees of the Panama Canal Company or Canal Zone government, employed on April 1, 1979; SH–7 Spouses or children of SH–6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[312] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers generally would not be a relative of the noncitizen or a for-profit entity and therefore the requirement for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

[313] Includes the following categories: SJ–6 Foreign medical school graduate who was licensed to practice in the United States on Jan. 9, 1978; SJ–7 Spouses or children of SJ–6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[314] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

[315] Includes the following categories: SK–6 Retired employees of international organizations; SK–7 Spouses of SK–1 or SK–6; SK–8; Certain unmarried children of SK–6; SK–9 Certain surviving spouses of deceased international organization employees.

[316] Includes the following categories: SN–6 Retired NATO–6 civilian employees; SN–7 Spouses of SN–6; SN–9; Certain surviving spouses of deceased NATO–6 civilian employees; SN–8 Certain unmarried sons/daughters of SN–6.

[317] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

[318] Includes the following categories: SM–6 U.S. armed forces personnel, service (12 years) after October 1, 1991, SM–9 U.S. armed forces personnel, service (12 years) by October 1991; SM–7 Spouses of SM–1 or SM–6; SM–0 Spouses or children of SM–4 or SM–9; SM–8 Children of SM–1 or SM–6.

[319] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

[320] Includes the following categories: BC–6 Broadcast (IBCG of BBG) employees; BC–7 Spouses of BC–1 or BC–6; BC–8 Children of BC–6.

[321] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

[322] Includes the following categories: SI–6 Special immigrant interpreters who are nationals of Iraq or Afghanistan; SI–6, SI–7, SI–8—spouse and child of SI–6; SQ–6 Certain Iraqis and Afghans employed by U.S. Government SQ–6, SQ7, SQ–8 Spouses and children of SQ–6; SI–6 Special immigrant interpreters who are nationals of Iraq or Afghanistan; SI–7 Spouses of SI–1 or SI–6; SI–8 Children of SI–1 or SI–6.

[323] Sections 245(c)(2), (7), and (8) of the INA, 8 U.S.C. 1255(c)(2), (7), and (8), do not apply to special immigrant Iraq and Afghan nationals who were employed by or on behalf of the U.S. government (for Section 602(b) and 1244 adjustment applicants who were either paroled into the United States or admitted as nonimmigrants). *See* Section 1(c) of Public Law 110–36, 121 Stat. 227, 227 (June 15, 2007), which amended Section 1059(d) of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109–163, 119 Stat. 3136, 3444 (Jan. 6, 2006) to state that sections 245(c)(2), (7), and (8) of the INA, 8 U.S.C. 1255(c)(2), (7), and (8), do not apply to Iraq or Afghan translator adjustment of status applicants.

[324] Includes the following categories: AS–6 Asylees; AS–7 Spouses of AS–6; AS–8 Children of AS–6; SY–8 Children of SY6; GA–6 Iraqi asylees; GA–7 Spouses of GA–6; GA–8 Children of GA–6.

[325] Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[326] Includes the following categories: RE–6 Other refugees (Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 102 (Mar. 17, 1980)); RE–7 Spouses of RE–6; RE–8 Children of RE–6; RE–9 Other relatives.

[327] Note that this program has a sunset date of 2 years after enactment, however, some cases may still be pending.

[328] Includes the following categories: HA–6 Principal HRIFA Applicant; Spouse of HA–6, HA–7; Child of HA–6, HA–8; Unmarried Son or Daughter 21 Years of Age or Older of HA–6, HA–9; Principal HRIFA Applicant paroled into the United States before December 31, 1995 HB–6; Spouse of HB–6, HB–7; Child of HB–6, HB–8; Unmarried Son or Daughter 21 Years of Age or Older of HB–6 HB–9; Principal HRIFA Applicant who arrived as a child without parents in the United States HC–6; Spouse of HC–6, HC–7; Child of HC–6, HC–8; Unmarried Son or Daughter 21 Years of Age or Older of HC–6, HC–9; Principal HRIFA Applicant child who was orphaned subsequent to arrival in the United States HD–6, Spouse of HD–6, HD–7; Child of HD–6, HD–8; Unmarried Son or Daughter 21 Years of Age or Older of HD–6, HD–9; Principal HRIFA Applicant child who was abandoned subsequent to arrival and prior to April 1, 1998 HE–6; Spouse of HE–6, HE–7; Child of HE–6, HE–8; Unmarried Son or Daughter 21 Years of Age or Older of HE–6, HE9. Note that this program has a sunset date of March 31, 2000; however, dependents may still file for adjustment of status.

[329] Includes the following categories: DV–6 Diversity immigrant; DV–7 Spouse of diversity immigrant; DV–8 Child of diversity immigrant.

[330] Diversity visas are issued under section 203(c) of the INA, 8 U.S.C. 1153, which do not fall under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).

[331] Includes the following categories: W–16 Entered without inspection before January 1, 1982; W–26 Entered as nonimmigrant and overstayed visa before January 1, 1982.

[332] Certain aged, blind, or disabled persons as defined in Section 1614(a)(1) of the Social Security Act, 42 U.S.C. 1382c(a)(1), may apply for a waiver of the public charge inadmissibility ground. *See* section 245A(d)(2)(B)(ii) and (iii) of the INA, 8 U.S.C. 1255A(d)(2)(B)(ii) and (iii).

[333] Adjustment of status based on T-nonimmigrant status is under section 245(l) of the INA, 8 U.S.C. 1255(l), which does not fall under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).

[334] DHS removed the regulations relating to Syrian asylees adjusting under Public Law 106–378 in 76 FR 53793, 53774 (Aug. 29, 2011) because the provision was obsolete given that there were no longer eligible applicants for the adjustment provisions. DOJ has a regulation for this program that remains in effect at 8 CFR 1245.20.

[335] S-nonimmigrants can apply for a waiver using the Inter-Agency Alien Witness and Informant Record (Form I–854). *See* section 245(j) of the INA, 8 U.S.C. 1255(j) and section 101(a)(15)(S) of the INA, 8 U.S.C. 1101(a)(15)(S). *See also* 8 CFR 214.2(t)(2) and 8 CFR 1245.11.

[336] Includes the following categories: NC–6 Nicaraguan or Cuban national; NC–7 Spouse of NC–6; NC–8 Child of NC–6; NC–9 Unmarried son or daughter 21 years of age or older of NC–6. Note that this program has a sunset date of April 1, 2000; however, some cases may still be pending.

[337] Includes the following categories: Z–13 Cancellation of removal; Z–14 Cancellation of removal of battered spouses or children pursuant to the Violence Against Women Act.

[338] Note that this program sunset date of September 30, 2014, only applies to parole. Eligible applicants may still apply for adjustment of status.

[339] In adjudicating TPS eligibility, USCIS is authorized to waive any ground of inadmissibility under section 212(a) of the INA, 8 U.S.C. 1182(a), for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, except for those that Congress specifically noted could not be waived or from which they are exempted by statute. *See* section 244(c)(2)(A) of the INA, 8 U.S.C. 1254a(c)(2)(A).

[340] *See* section 244(c)(2)(A) of the INA, 8 U.S.C. 1254a(c)(2)(A).

[341] Includes the following categories: LR–6 Liberian national as described in Section 7611(c)(1)(A) of the National Defense Authorization

Continued

C. Definitions

1. Likely at Any Time To Become a Public Charge

Both the 1999 Interim Field Guidance and the 1999 NPRM defined public charge to mean, for admission and adjustment purposes, ''an alien . . . who is likely to become . . . primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'' [343] This definition is based on DHS's conclusion that not all receipt of public benefits paid for in whole or in part by the government indicates that an individual is a public charge or is likely at any time to become a public charge.[344] Rather, the type of benefit received matters, and DHS's focus should be on the types of benefits that reflect primary dependence on the government.[345] Neither the 1999 Interim Field Guidance nor the 1999 NPRM defined ''likely'' or ''likely at any time to become a public charge'' [346] for purposes of making public charge inadmissibility determinations.

In the 2019 Final Rule, ''public charge'' was defined as a noncitizen who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two public benefits in 1 month counts as 2 months).[347] DHS also separately defined public benefits to include any Federal, State, local, or Tribal cash assistance for income maintenance (other than tax credits), including SSI, TANF, Federal, State, or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names), as well as a list of specified non-cash benefits that included SNAP, Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, most forms of Medicaid, and Public Housing.[348] DHS stated that the expanded definition was consistent with Congress' intent, and reflected the self-sufficiency goals set forth in PRWORA.[349] DHS wrote that this approach ''balance[d] an alien's lack of self-sufficiency against temporary welfare assistance that does not amount to a lack of self-sufficiency.'' [350]

The major change between the 1999 Interim Field Guidance and NPRM, on the one hand, and the 2019 Final Rule, on the other, was the degree of dependence on the government necessary to render an individual inadmissible as likely to become a public charge. Under the 2019 Final Rule, reliance on government support to assist with certain specified needs—food, housing, and health care—could be deemed sufficient to render an individual inadmissible as likely to become a public charge if the receipt of such benefits surpassed prescribed thresholds for duration of receipt. As set forth above, under the 1999 Interim Field Guidance and NPRM, by contrast, the former INS set a threshold of primary dependence on the government, as evidenced by the use of cash assistance or long-term institutionalization for care at government expense. Under the 1999 Interim Field Guidance approach, the use of supplemental government support to assist with discrete needs was deemed inadequate to render an individual inadmissible as likely to become a public charge.

DHS asked for public comment on how to define the term ''public charge'' in the ANPRM.[351] Some commenters noted that, before DHS enacted the 2019 Final Rule, there was a well settled understanding for more than 100 years that the term public charge meant an individual who is, or is likely to, become primarily and permanently dependent on the government for subsistence. Commenters characterized the approach taken in the 2019 Final Rule as an unprecedented departure from that longstanding meaning and requested that DHS continue to define public charge as a person who is primarily or entirely dependent on the government for subsistence.

DHS now proposes to adopt a standard more like the one used in the 1999 Interim Field Guidance and NPRM, which required primary dependence on the government for subsistence as demonstrated by the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

DHS now believes the ''primarily dependent'' standard is a better interpretation of the statute and properly balances the competing policy objectives established by Congress.[352] Although the term ''public charge'' does not have a single clear meaning, its basic thrust is clear: Significant reliance on the government for support. This has been the longstanding purpose of the public charge ground of inadmissibility; individuals who are unable or unwilling to work to support themselves, and who do not have other nongovernmental means of support such as family members, assets, or sponsors, are at the core of the term's meaning. Individuals who are likely to primarily rely on their own resources as well as some government support—even if they could be reliably identified—are less readily characterized as public charges. DHS does not believe that the term is best understood to include a person who receives benefits from the government to help to meet some needs but is not primarily dependent on the government and instead has one or more sources of independent income or resources upon which the individual primarily relies.

The forward-looking nature of the inquiry also suggests that it more naturally examines whether a noncitizen is likely to lack a primary means of support other than government assistance, rather than requiring predictions about the precise mix of means-tested benefits and other

Act for Fiscal Year 2020 (NDAA 2020) who has adjusted status under LRIF; LR–7 Spouse of LR–6; LR–8 Child of LR–6; LR–9 Unmarried son or daughter of LR–6.

[342] Adjustment of status based on LRIF is under Section 7611(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), which does not fall under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).

[343] *See* 64 FR 28676, 28681 (May 26, 1999); 64 FR 28689 (May 26, 1999).

[344] 64 FR 28689, 28692 (May 26, 1999).

[345] *Ibid.*

[346] 64 FR 28689 (May 26, 1999); 64 FR 28676 (May 26, 1999).

[347] 84 FR 41292, 41501 (Aug. 14, 2019).

[348] 84 FR 41292, 41501 (Aug. 14, 2019).

[349] 84 FR 41292, 41348–49 (Aug. 14, 2019).

[350] 84 FR 41292, 41351 (Aug. 14, 2019).

[351] *See* 86 FR 47025, 47028 (Aug. 23, 2021).

[352] In the 2019 Final Rule, DHS canvassed a range of sources to support the proposition that the statute was ambiguous, and that the new definition represented a reasonable interpretation of such ambiguity in light of the policy goals articulated in PRWORA. For example, DHS wrote that the rule ''is not inconsistent with Congress' intent in enacting the public charge ground of inadmissibility in [the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA)], or in enacting PRWORA.'' *See* 84 FR 41292, 41317 (Aug. 14, 2019). DHS noted that Congress enacted those two laws in the same year, that IIRIRA amended the public charge inadmissibility statute, and that PRWORA contained the statements of national policy. DHS continued by stating that the rule, ''in accordance with PRWORA, disincentivizes immigrants from coming to the United States in reliance on public benefits.'' *Id.* Similarly, in support of a similar definition of ''public charge'' in the 2018 NPRM, DHS wrote that ''the term public charge is ambiguous as to how much government assistance an individual must receive or the type of assistance an individual must receive to be considered a public charge. The statute and case law do not prescribe the degree to which an alien must be receiving public benefits to be considered a public charge. Given that neither the statute nor the case law prescribes the degree to which an alien must be dependent on public benefits to be considered a public charge, DHS has determined that it is permissible and reasonable to propose a different approach.'' *See* 83 FR 51114, 51164 (Oct. 10, 2018).

resources that an applicant is likely to use for a given period of time. The statutory factors that DHS is required to consider (age; health; family status; assets, resources, and financial status; and education and skills) could be relevant to either inquiry. But Congress might readily have presumed that DHS would be able to predict based on those factors (and any others that might be relevant) whether the noncitizen will have a primary means of support in the future apart from government benefits. By contrast, nothing in the statute instructs or equips DHS to make the type of complex prediction it aimed to do under the 2019 Final Rule as to whether the noncitizen would surpass a specific threshold of benefits receipt for designated benefits that contain particular thresholds for eligibility, some of which vary by State or locality or are available on a more generous basis to children or those with disabilities.

DHS's proposed definition of public charge is also consistent with how Congress legislated eligibility for means-tested benefits programs. As noted above, in 1996, Congress separately addressed the concern that noncitizens would seek admission or adjustment of status in order to take advantage of means-tested benefits programs by generally excluding them from participation for the first 5 years after admission or adjustment of status. One consequence of this change is that, in most cases, in administering the public charge ground of inadmissibility, DHS is unlikely to gain much insight by considering whether a given applicant has in the past received, or is currently receiving, specified public benefits (because most applicants are likely ineligible for those benefits). By contrast, DHS's past experience, as discussed in relation to chilling effects above, demonstrates the significant potential downsides of considering noncitizens' past or current receipt of benefits.

In this proposed rule, DHS opts for a compromise approach, in which DHS considers past or current receipt of the benefits most indicative of whether a person is likely to become primarily dependent on the government for subsistence. But DHS excludes from consideration a range of benefits that are less indicative of primary dependence, and for which applicants for admission and adjustment of status are likely ineligible in any event.

For the above reasons, DHS believes its proposed definition of public charge reflects a better interpretation of the statute and congressional purpose. In weighing alternatives to the definition of public charge proposed in this rule, DHS considered that neither DHS nor any reviewing court suggested that the 2019 Final Rule's definition of public charge was compelled by statute.

DHS's experience while the 2019 Final Rule was in effect largely supports DHS's proposed definition. In the Regulatory Impact Analysis (RIA) accompanying the 2019 Final Rule, DHS wrote that ''[t]he primary benefit of the final rule would be to better ensure that aliens who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status will be self-sufficient, *i.e.,* will rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations.'' [353] DHS interprets this statement to refer to: (1) Potential benefits associated with denials of admission and adjustment of status to those who are likely to become a public charge as defined in the rule (*i.e.,* potentially reduced transfer payments, which are not formally a benefit); and (2) benefits associated with the incentives created by the rule (*i.e.,* again reduced transfer payments due to the rule's potential deterrent effect on migration to the United States by those who might otherwise have hoped to rely on certain public benefits).[354] But notwithstanding DHS's decision at that time to expand the public charge definition to consider non-cash benefits, USCIS data show that during the year the 2019 Final Rule was in effect, out of the 47,555 applications to which the rule was applied, DHS issued only 3 denials (which were subsequently reopened and approved) and 2 Notices of Intent to Deny (which were ultimately rescinded, and the applications were approved) based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)–(B) of the Act, 8 U.S.C. 1182(a)(4)(A)–(B).[355]

[353] *See* 84 FR 41292, 41490 (Aug. 14, 2019) (citing 8 U.S.C. 1601(2)).

[354] At various points in the 2019 Final Rule's preamble, DHS identified each as a benefit. *See, e.g.,* 84 FR 41292, 41493 (Aug. 14, 2019) (''Additionally, because the final rule considers public benefits for purposes of the inadmissibility determination that were not considered under the 1999 Interim Field Guidance, DHS determined that the aliens found inadmissible under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), will likely increase. However, given the compelling need for this rulemaking, including but not limited to ensuring self-sufficiency and minimizing the incentive to immigrate based on the U.S. social safety net, DHS determined that this rulemaking's impact is justified, and no further actions are required.'').

[355] USCIS Field Operations Directorate (June 2021); USCIS Office of Performance and Quality (June 2021).

Experience with the 2019 Final Rule also suggests that the proposed definition would better achieve Congress's policy objectives in other arenas. As noted above, the 2019 Final Rule had a modest effect on denials under the public charge ground of inadmissibility. But the Rule had the significant and unintended effect of discouraging noncitizens from using benefits for fear that such benefits usage would be used against them in immigration proceedings, even though most categories of noncitizens who are eligible for benefits are not subject to the public charge ground of inadmissibility. That the 2019 Final Rule's predominant effect was unintended and had the result of discouraging people from accessing the benefits for which Congress determined they are eligible, counsels in favor of the approach within this proposed rule, which generally aligns with the standard that existed before the 2019 Final Rule. For instance, this approach mitigates the possibility that intending immigrants and their families (or others who are not subject to the public charge ground of inadmissibility), despite being eligible for benefits under PRWORA, would choose to disenroll from special purpose and supplemental benefits, which serve to reduce the likelihood that the beneficiary will become primarily dependent on the government for subsistence. Important public health objectives are also advanced by mitigating the risk that noncitizens are discouraged due to potential adverse immigration consequences from obtaining healthcare coverage, where eligible. This is a particularly important goal in light of the ongoing COVID–19 pandemic and potential similar public health crises in the future.

DHS believes that defining ''likely at any time to become a public charge'' as ''likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense,'' provides a closer connection between the exact language used in the statutory standard and the regulatory definition than an approach that simply defines the term ''public charge'' independent of the forward-looking aspect of the statutory standard.

In response to comments received after publishing the 2018 NPRM, DHS stated that it was necessary, in addition to defining public charge and public benefits, to also clarify the degree of likelihood that would be high enough to justify a denial based on the public charge ground of inadmissibility.[356] As a result, in the 2019 Final Rule, DHS defined ''likely at any time to become a public charge'' to mean more likely than not at any time in the future to become a public charge based on the totality of the person's circumstances.[357] DHS explained that ''likely'' and ''more likely than not'' have been used interchangeably in other DHS regulations interpreting the same term in other parts of the statute and also are supported by case law.[358]

DHS therefore proposes that an individual is likely at any time to become a public charge if the individual is likely to become primarily dependent on the government for subsistence, as demonstrated by either receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. DHS welcomes comment on whether it should use ''primarily'' dependent on the government for subsistence, as opposed to a greater or lesser level of dependence. DHS also believes that it is appropriate, and consistent with DHS's broad discretion and historical practice in administering the public charge ground of inadmissibility, to not specify a specific numerical formula or threshold associated with this standard. DHS welcomes comment on alternative approaches, however.

2. Public Benefits

DHS proposes to consider the same list of public benefits that are considered under the 1999 Interim Field Guidance with a few clarifications. These benefits are public cash assistance for income maintenance and long-term institutionalization at government expense (including when funded by Medicaid). DHS believes that this approach is consistent with a more natural interpretation of the term ''public charge'' and has the additional benefit of being more administrable and consistent with long-standing practice than the 2019 Final Rule, and less likely to result in the significant chilling effects and burdens on State and local governments that were observed following promulgation of the 2019 Final Rule.

In proposing to consider these benefits, DHS reviewed the discussion of these issues in the 1999 Interim Field Guidance and NPRM, as well as the 2019 Final Rule. The public benefits covered in the 1999 Interim Field Guidance and again in this NPRM are consistent with the case law;[359] past practices of the former INS, DHS, and DOS; limited eligibility for public benefits among the categories of noncitizens subject to the public charge ground of inadmissibility; and the public policy considerations that have consistently informed administrative policymaking in this area.[360] It has never been DHS (or the former INS) policy that receipt of any public services or benefits paid for wholly or in part by government funds renders a noncitizen inadmissible as likely to become a public charge.[361] The nature of the program must be considered in light of public health and other national public policy decisions.[362] For example, DHS, and the INS before it, have never considered free or subsidized school lunches, home energy assistance, childcare assistance, or special nutritional benefits for children and pregnant women to be the types of public benefits that should be considered in a public charge determination, notwithstanding that each could conceivably have some nexus to future primary dependence on the government (or, in the case of the 2019 Final Rule, some nexus to future receipt of designated benefits above that rule's durational threshold).[363]

DHS notes that the structure of means-tested benefits programs—many of which were changed in 1996, roughly contemporaneously with the last amendment to the public charge provision—supports the view that predicted participation in non-cash programs should not lead to a conclusion that a noncitizen is likely to become a public charge. Many modern public assistance programs take the form of payments or in-kind benefits to help individuals meet particular needs and are not limited to individuals without a separate primary means of support. The Medicaid program, subsidized housing, and SNAP provide benefits to millions of individuals and families across the nation, many of whom also work.[364] One analysis of the 2019 Final Rule found that ''[i]n a single year, 24 percent—nearly 1 in 4—of U.S.-born citizens receive one of the main benefits in the [rule's] definition . . . . Looking at benefit receipt at any point over a 20-year period, approximately 41 to 48 percent of U.S.-born citizens received at least one of the main benefits in the public charge definition.'' [365] Although the public charge ground of inadmissibility does not apply to most participants in these programs, it would seem not to comport with common usage to describe so many Americans as being public charges.[366] Relatedly, all program participants will need a separate source of income to meet a number of basic needs.

Cash assistance programs, on the other hand, are often reserved for individuals with few if any other sources of income.[367] In addition,

[356] 84 FR 41292, 41392–93 (Aug. 14, 2019).

[357] 84 FR 41292, 41501 (Aug. 14. 2019).

[358] 84 FR 41292, 41392–93 (Aug. 14, 2019).

[359] Although no cases have specifically identified which types of public benefits can give rise to a public charge finding, a definition that is based on primary dependence on the government remains consistent with the facts found in the case law relied on in the 1999 Interim Field Guidance and the 1999 NPRM. *See* 64 FR 28689, 28690 (May 26, 1999) and 64 FR 28676, 28677 (May 26, 1999).

[360] *See* 64 FR 28689, 28690 (May 26, 1999) and 64 FR 28676, 28677 (May 26, 1999).

[361] *See* 64 FR 28689, 28692 (May 26, 1999).

[362] *See* 64 FR 28689, 28692 (May 26, 1999).

[363] *See* 64 FR 28689, 28692–28693 (May 26, 1999).

[364] For instance, in July 2021, over 76 million individuals were enrolled in Medicaid, of whom between 42–44 million were adults. *See* Medicaid.gov, July 2021 Medicaid & CHIP Enrollment Data Highlights, *https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html* (accessed Feb. 10, 2022).

[365] Center on Budget and Policy Priorities, Administration's Public Charge Rules Would Close the Door to U.S. to Immigrants Without Substantial Means (Nov. 11, 2019), *https://www.cbpp.org/research/immigration/administrations-public-charge-rules-would-close-the-door-to-us-to-immigrants* (accessed Jan. 27, 2022). The analysis also observed that ''[i]n contrast, only about 5 percent of U.S.-born citizens meet the [1999 Interim Field Guidance] benefit-related criteria in the public charge determination.'' *Id.*

[366] In the 2018 NPRM, DHS stated that ''[c]ash aid and non-cash benefits directed toward food, housing, and healthcare account for significant federal expenditure on low-income individuals and bear directly on self-sufficiency,'' and emphasized the significant impact, in terms of overall expenditures, of non-cash benefit programs such as Medicaid and SNAP. *See* 83 FR at 51160. At the same time, DHS acknowledged that ''receipt of non-cash public benefits is more prevalent than receipt of cash benefits'' (83 FR at 51160.), and DHS cited data indicating that over 20 percent of the U.S. population receives Medicaid, SNAP, or Federal housing assistance, whereas 3.5 percent of the U.S. population receives cash benefits (83 FR at 51162). DHS acknowledges that non-cash benefits programs involve significant expenditures of government funds, but the Department believes that the term ''public charge'' is best interpreted by reference to the degree of an individual's dependence on the government for support, rather than the scale of overall government expenditures for particular programs.

[367] *See, e.g.,* HHS Office of Family Assistance, Characteristics and Financial Circumstances of TANF Recipients, FY 2010 (Aug. 8, 2012), *https://www.acf.hhs.gov/ofa/data/characteristics-and-financial-circumstances-tanf-recipients-fiscal-year-2010* (accessed Jan. 25, 2022) (''In FY 2010, about 17 percent of TANF families had non-TANF income.''); SSA, Fast Facts & Figures About Social Security, 2021, *https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2021/fast_facts21.html* (among SSI recipients, ''[e]arned income was most prevalent (4.1%) among those aged 18–64''); GAO, GAO–17–558, Federal Low-Income Programs: Eligibility and Benefits Differ for Selected Programs Due to Complex and Varied Rules at 23–24 (June 2017) (illustrating income eligibility thresholds for a hypothetical family of three, and showing lower

because cash assistance is not restricted to particular uses, receipt of cash assistance—which often coincides with receipt of other means-tested benefits [368]—allows an individual to become dependent on the government in a way that participation in one or more non-cash benefits programs cannot. For example, an individual who receives only non-cash assistance would need another source of income to acquire various basic necessities like clothing or household items, while an individual who receives cash assistance could potentially rely on that assistance, combined with non-cash government benefits, to the exclusion of any other independent source of income or support.

In addition, as discussed above, when deciding to limit consideration to public cash assistance for income maintenance and ''institutionalization for long-term care'' at government expense,[369] the former INS consulted with benefit-granting agencies. The former INS concluded that cash assistance for income maintenance and long-term institutionalization at government expense constituted the best evidence of whether a noncitizen is primarily dependent on the government for subsistence.[370]

In reaching this conclusion, the INS observed that non-cash benefits (with the exception of ''institutionalization for long-term care at government expense'') are, by their nature, supplemental and do not, alone or in combination, provide sufficient resources to support an individual or a family.[371] In addition to receiving non-cash benefits, a noncitizen would have to have either additional income (such as wages, savings, or earned retirement benefits) or public cash assistance to support themselves or their family.[372] Thus, by focusing on public cash assistance for income maintenance and ''institutionalization for long-term care'' at government expense, the INS believed that it could more readily identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests.[373] Additionally, the INS observed that certain Federal, State, and local benefits were increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient.[374] Thus, the INS concluded that participation in such non-cash programs is not evidence of primary dependence.[375]

In formulating such a conclusion, the former INS relied heavily on the expertise of HHS and other benefit-granting agencies in the form of consultation letters. HHS, in its consultation letter, stated that non-cash benefits (with the exception of institutionalization for long-term care at government expense) provide supplementary support to low-income families in the form of vouchers or direct services to support nutrition, health, and living condition needs.[376] The primary objectives of these non-cash benefits are to supplement and support the overall health and nutrition of the community by making services generally available to all.[377] When comparing cash benefits to non-cash benefits and support programs, the non-cash programs generally have more generous eligibility rules in order to also make them available to individuals and families with incomes well above the poverty line so that more people within the community have access to these programs that support individuals to be self-sufficient.[378] HHS further stated that it is extremely unlikely that an individual or family other than someone who permanently resides in a long-term care institution could subsist solely on a combination of non-cash support benefits or services, so as to be primarily dependent on the government for subsistence. HHS provided a few examples of non-cash benefits that do not directly provide subsistence: Food stamps (now SNAP), Medicaid (with the exception of long-term institutionalization at government expense, as noted in this proposed rule), CHIP and their related State programs, WIC, housing benefits, and transportation vouchers. The one and only exception identified by HHS to the principle that non-cash benefits do not demonstrate primary dependence on the government for subsistence is the instance where Medicaid or other government programs pay for the costs of a person's long-term institutionalization for care.[379] HHS concluded that the receipt of these non-cash benefits (except institutionalization for long-term care at government expense) should not be relevant in public charge determinations.

In the 2019 Final Rule, DHS expanded the list of public benefits that would be considered by DHS to include certain non-cash benefits beyond institutionalization for long-term care at government expense, including SNAP, most non-emergency forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and public housing under the Housing Act of 1937.[380] As noted above, however, even in 2019, DHS did not express a view that it was under a statutory obligation to expand its inquiry in this way; instead, DHS justified the expansion by reference to other policy goals, such as the significant national expenditures for each designated benefit, and DHS's desire to more closely align public charge policy with its interpretation of the statement of national policy contained in PRWORA. DHS also concluded that it—

> does not believe that Congress intended for DHS to administer section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), in a manner that fails to account for aliens' receipt of food, medical, and housing benefits so as to help aliens *become* self-sufficient. DHS believes that it will ultimately strengthen public safety, health, and nutrition through this rule by denying admission or adjustment of status

income eligibility thresholds for SSI ($1,551) and TANF ($0 to $1,660, depending on the State) as compared to SNAP ($2,184), Housing Choice Vouchers ($1,613 to $4,925 depending on the program and State), and Medicaid ($218 to $5,359 depending on the beneficiary's age and the State)).

[368] *See, e.g.,* Center on Budget and Policy Priorities, Policy Basics: Supplemental Security Income (Feb. 8, 2021), *https://www.cbpp.org/research/social-security/supplemental-security-income* (''Over 60 percent of SSI recipients also get SNAP (food stamps) and about one-quarter receive housing assistance.'') (accessed Jan. 26, 2022).

[369] As explained more fully below, for the purposes of this proposed rule, DHS is replacing the term ''institutionalization for long-term care at government expense'' that was used in the 1999 NPRM and 1999 Interim Field Guidance with the term ''long-term institutionalization.''

[370] *See* 64 FR 28676, 28677 (May 26, 1999). The former INS consulted primarily with HHS, SSA, and USDA in formulating the list of public benefits that would be considered. See 64 FR 28676, 28677 (May 26, 1999).

[371] *See* 64 FR 28689, 28692 (May 26, 1999).

[372] *Ibid.*

[373] *See* 64 FR 28689, 28692 (May 26, 1999).

[374] *Ibid.*

[375] *See* 64 FR 28676, 28677–28678 (May 26, 1999) and 64 FR 28689, 28692 (May 26, 1999).

[376] *See* HHS letter in 64 FR 28676, 28686–28687 (May 26, 1999).

[377] *See* HHS letter in 64 FR 28676, 28686 (May 26, 1999).

[378] *See* HHS letter in 64 FR 28676, 28686 (May 26, 1999). While the SSA letter did not address non-cash benefits, the USDA letter concurred with the HHS letter and provided that neither the receipt of food stamps nor nutritional assistance as provided for under the Special Nutritional Programs should be considered in making a public charge determination. See 64 FR 28676, 28687–28688 (May 26, 1999).

[379] *See* HHS letter in 64 FR 28676, 28686 (May 26, 1999).

[380] *See* 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction,* 84 FR 52357 (Oct. 2, 2019).

to aliens who are not likely to be self-sufficient.[381]

When developing this proposed rule, as in 1999, DHS consulted with benefits-granting agencies, including USDA, which administers SNAP. As part of that consultation, USDA provided an on-the-record letter to DHS, similar to the letters included in an appendix to the 1999 NPRM, affirming that receipt of SNAP benefits does not indicate that an individual is likely to become primarily dependent on the government for subsistence. The letter explains that SNAP is supplementary in nature as the benefits are calculated to cover only a portion of a household's food costs with the expectation that the household will use its own resources to provide the rest. The letter also states that SNAP benefits are modest and tailored based on the Thrifty Food Plan (TFP), USDA's lowest cost food plan, and that an individual or family could not subsist on SNAP alone. Historically, most households receive less than the maximum allotment. According to USDA, the average per-person benefit in February 2020, prior to the pandemic, was about $121. While this amount has since increased—the 2021 reevaluation of the TFP and cost-of-living adjustments brings the average regular SNAP benefit to $169 per person today—the TFP estimates that the actual cost to feed an individual is $209.

USDA emphasized that SNAP benefits can only be used for the purchase of food, such as fruits and vegetables, dairy products, breads and cereals, or seeds and plants that produce food for the household to eat. SNAP benefits may not be converted to cash or used to purchase hot foods or any nonfood items. Receiving SNAP benefits only pertains to a need for supplemental food assistance and does not address all food needs or other general needs such as cooking equipment, hygiene items, or clothing, for example.

USDA also stated that there is no research demonstrating that receipt of SNAP benefits is a predictor of future dependency. USDA identified a study that showed that SNAP receipt in early motherhood does not lead to more or less participation in public assistance programs in the long run compared to other young mothers who have low income but do not receive SNAP.[382] USDA recommended that DHS continue the long-standing practice prior to the 2019 Final Rule, as set forth in the 1999 Interim Field Guidance, that receipt of benefits from nutrition assistance programs administered by USDA should not be taken into account in public charge inadmissibility determinations in this proposed rule.[383]

During development of this proposed rule, DHS also consulted with HHS, which administers TANF and Medicaid. As part of that consultation, HHS provided an on-the-record letter to DHS, similar to the USDA letter and the letters included in an appendix to the 1999 NPRM. In that letter HHS expressed their general support for the approach to public charge inadmissibility taken by INS in the 1999 Interim Field Guidance and 1999 NPRM, and specifically supported an understanding of public charge linked to being primarily dependent on the government for subsistence as demonstrated by the receipt of cash assistance for income maintenance or long-term institutionalization at government expense.

In its letter, HHS evaluated the Medicaid program within the context of a public charge definition based on primary dependence on the government for subsistence. HHS stated that ''with the exception of long-term institutionalization at government expense, receipt of Medicaid benefits is . . . not indicative of a person being or likely to become primarily dependent on the government for subsistence.'' This conclusion was based on HHS' assessment that Medicaid, except for long-term institutionalization, does not provide assistance to meet basic subsistence needs such as for food or housing.

In addition, HHS highlighted developments since 1999 that ''reaffirm Medicaid's status as a supplemental benefit.'' These developments include Congressional action that has expanded Medicaid coverage, such that in many states individuals and families are eligible for Medicaid despite having income substantially above the HHS poverty guidelines. HHS also noted that among working age adults without disabilities who participate in the Medicaid program, most are employed.[384] HHS discussed the significant negative public health impacts that could potentially be associated with considering Medicaid generally as indicative of primary dependence in a public charge inadmissibility determination, as highlighted by the COVID–19 pandemic ''and the important role that HHS health care programs like Medicaid have played in vaccination and treatment of COVID–19.''

HHS also agreed with DHS that ''receipt of cash assistance for income maintenance, in the totality of the circumstances, is evidence that an individual may be primarily dependent on the government for subsistence.'' HHS addressed the TANF program, which it administers, and stated that unlike Medicaid, cash assistance programs under TANF have remained limited to families with few sources of other income and are much more frequently used as a primary source of subsistence.

In addition to reflecting a better interpretation of the term ''public charge,'' as discussed above, DHS's general approach to public benefits in this proposed rule also better balances the competing policy objectives established by Congress, including ensuring that individuals eligible for certain public benefits are not unduly dissuaded from applying for them. This proposed rule is not an example of DHS administering the public charge ground of inadmissibility ''so as to help aliens *become* self-sufficient,'' as DHS argued in 2019. Rather, this rule is an effort to faithfully implement the public charge statute without unnecessarily and at this point, predictably, harming separate efforts related to health and well-being of people whom Congress made eligible for supplemental supports. This approach is also supported by the feedback DHS received on the ANPRM. Many commenters to the ANPRM recommended that DHS exclude non-cash benefits in any new proposed regulation due to the negative consequences of including consideration of non-cash benefits, which were highlighted by the COVID–19 pandemic. As far as the economic impact, an association for hospitals and health systems stated that

> [t]he negative effects of COVID–19 go beyond health care . . . Further inclusion of housing and nutritional benefits [in a public charge definition] counteracts the progress that policymakers, health care providers, and other community partners have made in

[381] *See* 84 FR 41292, 41314 (Aug. 14, 2019).

[382] Vartanian, Thomas P.; Houser, Linda; and Harkness, Joseph. ''Food Stamps and Dependency: Disentangling the Short-term and Long-term Economic Effects of Food Stamp Receipt and Low Income for Young Mothers,'' *The Journal of Sociology & Social Welfare,* 2011. Available at: *https://scholarworks.wmich.edu/jssw/vol38/iss4/6.*

[383] In the 2022 letter, USDA also mentioned the Nutrition Assistance Program (NAP) block grants that operate in American Samoa, CNMI, and Puerto Rico. These block grants provide nutritional assistance to low-income households in the U.S. territories. USDA proposed that NAP benefits also not be considered in a public charge inadmissibility determination and indicated that the NAP benefits are even more modest than SNAP benefits.

[384] *See* Kaiser Family Foundation, *Work Among Medicaid Adults: Implications of Economic Downturn and Work Requirements* (Feb. 11, 2021), available at *https://www.kff.org/report-section/work-among-medicaid-adults-implications-of-economic-downturn-and-work-requirements-appendix-2/* (accessed Feb. 15, 2022).

addressing factors beyond clinical care that influence a person's health, including their social, economic, and environmental circumstances. Disenrollment from or delayed enrollment in these programs will inevitably drive up poverty rates, homelessness, and malnutrition, all of which lead to adverse health outcomes and undermine public health.

Another commenter stated that ''[t]he inclusion of any non-cash benefit in the public charge assessment creates confusion that causes people to avoid essential services.''

While, as discussed above, DHS had anticipated some of the consequences of the 2019 Final Rule as it relates to chilling effects before promulgating that rule, it underestimated the scope of the chilling effects, which was highlighted by the COVID–19 pandemic. The inclusion of non-cash benefits in the 2019 Final Rule had a chilling effect on enrollment in Federal and State public benefits, including Medicaid, resulting in fear and confusion in the immigrant community. Concerns over actual and perceived adverse legal consequences tied to seeking public benefits have affected whether or not immigrants seek to enroll in public programs, particularly Medicaid and CHIP, and have resulted in a decrease in health insurance rates of eligible immigrants, particularly Latinos.[385]

Moreover, as discussed above, many of the pandemic's effects have been felt most acutely in more vulnerable communities, including localities with high poverty rates and among certain racial and ethnic populations.[386] Medicaid provides critical health care services including vaccination, testing and treatment of COVID–19.[387] Commenters on the 2018 NPRM expressed concerns that it would make immigrant families afraid to seek the healthcare they need, including vaccinations, endangering their health and their communities. DHS acknowledges the extensive evidence that the 2019 Final Rule had the effect of discouraging people, including children, from accessing important nutrition and health benefits, both before and during the pandemic, even among individuals who were not subject to the public charge inadmissibility ground.

This proposed rule reflects, in part, an effort by DHS to avoid exacerbating such ongoing challenges in vulnerable communities. The effects of the 2019 Final Rule, both direct and indirect, were felt strongly by vulnerable populations, including populations that have seen disproportionate impacts from the COVID–19 pandemic. At the same time as the government was relying extensively on public benefits as a part of its strategy to address the public health and economic effects of the pandemic, immigrant families withdrew from or avoided participation in important programs such as Medicaid, SNAP, and housing assistance, as noted above.[388] The decline in benefit use is particularly notable among vulnerable U.S. citizen children with noncitizen family members even though those children are not subject to the public charge ground of inadmissibility.[389] By focusing on those public benefits that are indicative of primary dependence on the government for subsistence, DHS can faithfully administer the public charge ground of inadmissibility without exacerbating challenges confronting individuals who work, go to school, and contribute meaningfully to our nation's social, cultural, and economic fabric. This approach is consistent with the INA, PRWORA, and this country's long history of welcoming immigrants seeking to build a better life.

In short, to best respond to commenters' concerns, and to achieve closer alignment to the statute and ease of administrability, DHS now proposes a policy more closely resembling the 1999 Interim Field Guidance framework (with some clarifications) in which non-cash benefits, except for long-term institutionalization at government expense, would be excluded from consideration in a public charge inadmissibility determination. By focusing on cash assistance for income maintenance and long-term institutionalization at government expense, DHS can identify those individuals who are likely at any time to become primarily dependent on the government for subsistence, without interfering with the administrability and effectiveness of other benefit programs that serve important public interests. DHS welcomes comment on the proposal to consider cash assistance for income maintenance, but not non-cash benefits (apart from long-term institutionalization), in determining whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence. DHS also notes that it remains particularly concerned about the potential effects of public charge policy on children, including children in mixed-status households. DHS welcomes public comments on ways to mitigate unintended adverse impacts on children, while remaining faithful to the public charge statute, which does not contain an exemption for children and requires consideration of age.

3. Public Cash Assistance for Income Maintenance

DHS proposes that public cash assistance for income maintenance would mean: (1) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.;* (2) Cash assistance for income maintenance under Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.;* or (3) State, Tribal, territorial, or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names).

Supplemental Security Income (SSI) provides monthly income payments intended to help ensure that aged, blind or disabled persons with limited income and resources have a minimum level of

[385] *Health Insurance Coverage and Access to Care for Immigrants: Key Challenges and Policy Options,* HHS, Assistant Secretary for Planning and Evaluation (ASPE), Office of Health Policy (Dec. 2021), available at *https://aspe.hhs.gov/sites/default/files/documents/96cf770b168dfd45784cdcefd533d53e/immigrant-health-equity-brief.pdf* (accessed Feb. 2, 2022).

[386] *See* CDC, Demographic Trends of COVID–19 cases and deaths in the U.S. reported to CDC, available at *https://covid.cdc.gov/covid-data-tracker/#demographics* (accessed Feb. 1, 2022). *See also* CDC, COVID–19 7-Day Case Rate per 100,000 Population in United States, by Percentage of County Population in Poverty, available at *https://covid.cdc.gov/covid-data-tracker/#pop-factors_7daynewcases* (accessed Feb 1, 2022).

[387] *See* Centers for Medicare & Medicaid Services (CMS) Vaccine Toolkit: Coverage and Reimbursement of COVID–19 Vaccines, Vaccine Administration, and Cost Sharing under Medicaid, the Children's Health Insurance Program, and Basic Health Program (updated May 2021), available at: *https://www.medicaid.gov/state-resource-center/downloads/covid-19-vaccine-toolkit.pdf;* CMS State Health Official letter #12–006, ''Mandatory Medicaid and CHIP Coverage of COVID–19-Related Treatment under the American Rescue Plan Act of 2021,'' (issued October 22, 2021), available at: *https://www.medicaid.gov/federal-policy-guidance/downloads/sho102221.pdf;* CMS State Health Official letter #21–003, ''Medicaid and CHIP Coverage and Reimbursement of COVID–19 Testing under the American Rescue Plan Act of 2021 and Medicaid Coverage of Habilitation Services'' (issued August 30, 2021), available at *https://www.medicaid.gov/federal-policy-guidance/downloads/sho-21-003.pdf.*

[388] *See* Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), Immigrant Families Continued Avoiding the Safety Net during the COVID–19 Crisis at 1 (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

[389] *See* Randy Capps et al., Migration Policy Institute, Anticipated ''Chilling Effects'' of the Public-Charge Rule Are Real: Data Reflect Steep Decline in Benefits Use by Immigrant Families (Dec. 2020), *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 26, 2022). *See also* Barofsky, Jeremy, et al. Spreading Fear: The Announcement of The Public Charge Rule Reduced Enrollment in Child Safety-Net Programs (Oct. 2020); Health Affairs Vol. 39, No.10: Children's Health, *https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763* (accessed Jan. 18, 2022).

income.[390] SSI is administered by the U.S. Social Security Administration.[391] The SSI program operates in the 50 States, the District of Columbia, and the Northern Mariana Islands.[392] The program also covers blind or disabled children of military parents stationed abroad and certain students studying outside the United States for a period of less than one year.[393] The eligibility requirements and the Federal income floor are identical everywhere the program operates; this provides assurance of a minimum income that States and the District of Columbia may choose to supplement.[394] In order to receive SSI benefits, an individual cannot have monthly countable income more than the current Federal benefit rate (FBR). The FBR for an eligible couple is approximately one and a half as much as that for an individual. These amounts are set by law and are subject to annual increases based on cost-of-living adjustments.[395] The monthly maximum Federal amounts for 2022 are $841/month for an eligible individual, $1,261/month for an eligible individual with an eligible spouse, and $421 for an essential person.[396] The amount of an individual's income determines eligibility for SSI and the amount of the SSI benefit—generally, the more income a person receives, the lower the SSI benefit.[397]

Temporary Assistance for Needy Families (TANF) is a Federal block grant that can be used to provide cash assistance for income maintenance to needy families with children,[398] along with a broad range of other benefits and services that meet one or more of the four purposes of TANF.[399] The TANF program provides approximately $16.5 billion to States, the District of Columbia, and U.S. territories (Guam, the U.S. Virgin Islands, and Puerto Rico). Federally recognized American Indian tribes and Alaska Native organizations may offer TANF through the tribal TANF program.[400] The Federal Government does not provide TANF cash assistance or other TANF benefits and services directly to the public. Instead, States, territories, and Tribes determine the uses of their TANF grants and then provide cash assistance and other benefits and services to eligible beneficiaries.[401] ''TANF assistance benefit amounts are set by states. In July 2019, the maximum monthly benefit for a family of three ranged from $1,066 in New Hampshire to $170 in Mississippi. Only New Hampshire (at 60% of the Federal poverty guidelines) had a maximum TANF assistance amount for this sized family in excess of 50% of poverty-level income.'' [402] Like the 1999 NPRM and the 1999 Interim Field Guidance, in this rule DHS is only proposing to take into consideration in public charge inadmissibility determinations cash assistance payments for income maintenance, but not other benefits or services funded by TANF block grants.

Programs of cash assistance for income maintenance provided at various levels of government are sometimes called ''General Assistance,'' but sometimes given other names. ''General assistance is often the only resource for individuals who cannot qualify for unemployment insurance, or whose benefits are inadequate or exhausted. Help may either be in cash or in kind, including such assistance as groceries and rent.'' [403] ''The eligibility requirements and payment levels for general assistance vary from State to State, and often within a State. Payments are usually at lower levels and of shorter duration than those provided by federally financed programs.'' [404] General assistance is administered and financed by State and local governments under their own guidelines. For example, in Minnesota, the ''General Assistance program helps people without children pay for basic needs. It provides money to people who can[no]t work enough to support themselves, and whose income and resources are very low.'' [405] To the extent that aid provided through a general assistance program is in the form of cash, check, or money instrument (as compared to in-kind goods or services through vouchers and similar means) and intended for income maintenance, DHS would consider it as cash assistance for income maintenance under this proposed rule.

Similar to the approach taken in the 1999 NPRM and 1999 Interim Field Guidance, not all cash assistance would be relevant for public charge inadmissibility purposes. For example, cash payments that are provided for child-care assistance or other supplemental, special purpose cash assistance would not be considered in a public charge inadmissibility determination because they do not constitute primary dependence on the government for subsistence.[406] Similarly, DHS would not consider special purpose benefits like energy assistance provided through the Low Income Home Energy Assistance Program (LIHEAP) [407] because such assistance is not intended for income maintenance. Nor would DHS consider Stafford Act disaster assistance, including financial assistance provided to individuals and households under Individual Assistance under the Federal Emergency Management Agency's (FEMA) Individuals and Households Program [408] as cash assistance for income maintenance. The same would be true for comparable disaster assistance provided by State, Tribal, territorial, or local, governments.

Federal, State, Tribal, territorial, and local governments provided pandemic-related cash assistance in response to

[390] *See* U.S. Soc. Sec. Admin., Social Security Handbook, Ch. 21 (''SSA Handbook''), section 2102.1, available at *https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-toc21.html* (accessed Jan. 31, 2022).

[391] *See* SSA Handbook section 2101 (accessed Jan. 31, 2022).

[392] *See* SSA Handbook section 2103 (accessed Jan. 31, 2022).

[393] *See* SSA Handbook section 2103 (accessed Jan. 31, 2022).

[394] *See* SSA Handbook section 2102 (accessed Jan. 31, 2022). Only four States and one territory choose not to supplement Federal SSI: Arizona, Commonwealth of Northern Mariana Islands, Mississippi, North Dakota, West Virginia. See: *Understanding Supplemental Security Income SSI Benefits—2021 Edition, https://www.ssa.gov/ssi/text-benefits-ussi.htm* (accessed Jan. 31, 2022).

[395] *See* SSA Handbook section 2113.1.

[396] *See* SSI Federal Payment Amounts for 2022, *https://www.ssa.gov/oact/cola/SSI.html* (accessed Jan. 31, 2022).

[397] *See* SSA Handbook, Ch. 21, section 2128, *https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-toc21.html* (accessed Jan. 31, 2022).

[398] See HHS, Admin. for Children & Families, Office of Family Assistance, About TANF, available at *https://www.acf.hhs.gov/ofa/programs/tanf/about* (accessed Feb. 1, 2022).

[399] *See* 42 U.S.C. 601 (The purpose of this part is to increase the flexibility of States in operating a program designed to: (1) Provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.).

[400] *See* 42 U.S.C. 612.

[401] See Office of Family Assistance, Help for Families, available at *https://www.acf.hhs.gov/ofa/map/about/help-families* (accessed Jan. 31, 2022).

[402] *See,* Congressional Research Services, *The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions, https://sgp.fas.org/crs/misc/RL32760.pdf* (Updated Dec. 14, 2021).

[403] *See* U.S. Soc. Sec. Admin., Social Security Programs in the United States—General Assistance, available at *https://www.ssa.gov/policy/docs/progdesc/sspus/genasist.pdf* (accessed Jan. 31, 2022).

[404] *Id.*

[405] *See* Minn. Dep't of Human Servs., General Assistance (GA), available at *https://mn.gov/dhs/people-we-serve/adults/economic-assistance/income/programs-and-services/ga.jsp* (accessed Jan. 31, 2022).

[406] *See* 64 FR 28689, 28692–28693 (May 26, 1999).

[407] *See* 42 U.S.C. 8621, *et seq.*

[408] *See* 42 U.S.C. 5174.

COVID–19. This took a variety of forms, including Economic Impact Payments and the California Pandemic Emergency Assistance Fund. Under this proposed rule, DHS would not consider these types of supplemental, special purpose cash assistance programs or similar ones established in response to future public health emergencies in public charge inadmissibility determinations.

Other categories of cash assistance that are not intended to maintain a person at a minimum level of income, such as assistance specifically targeted to aid survivors of trafficking or crime, would similarly not fall within the definition. Moreover, earned cash benefits would continue to be excluded from consideration in public charge inadmissibility determinations. A few examples of such earned benefits that would not be considered include Title II Social Security benefits, government pension benefits, unemployment insurance payments, and veterans' benefits, as well as any benefits received via a tax credit or deduction.[409]

DHS has clarified above that special-purpose and earned-benefit cash assistance programs would not be considered in public charge inadmissibility determinations. The proposed regulatory text does not explicitly address the exclusion of these programs but does limit the consideration of cash assistance to programs providing cash assistance intended for income maintenance. DHS welcomes comment on how, if at all, to clarify these exclusions within the final rule or related guidance.

In response to the 2021 ANPRM, some commenters encouraged DHS to exclude all exclusively non-Federal benefits, including cash benefits, from public charge inadmissibility determinations. A coalition of more than 630 national, State, and local organizations and agencies wrote that programs funded solely by a State ''are exercises of the powers traditionally reserved to the states and should not be counted as factors in a new public charge test.'' The commenter explained that the State provided State-funded benefits, including cash benefits, to foreign-born victims of trafficking, torture, or other serious crimes, and their derivative family members. The coalition emphasized that States and localities ''have a compelling interest in promoting health and safety that includes providing benefits at their own expense without barriers caused by federal policies,'' and suggested that because ''these benefits vary significantly by state, excluding all state and local programs will make the public charge rule easier for immigrants and federal DHS adjudicators to understand.''

Although this proposed rule covers Federal, State, Tribal, territorial, or local cash benefit programs for income maintenance (consistent with past policy and the original function of the public charge ground of inadmissibility), DHS welcomes comment on this proposal, particularly as it relates to non-Federal programs targeted at individual populations.

4. Long-Term Institutionalization at Government Expense

Consistent with the 1999 Interim Field Guidance and 1999 NPRM, DHS proposes that long-term institutionalization at government expense (in the case of Medicaid, limited to institutional services under section 1905(a) of the Social Security Act), including in a nursing home or mental health institution, be included in public charge inadmissibility determinations.[410] Similarly, long-term institutionalization at government expense would be the only category of Medicaid-funded services to be considered in public charge inadmissibility determinations.

As suggested by HHS in its on-the-record consultation letter, DHS proposes to replace the term ''institutionalization for long-term care at government expense,'' used in the 1999 Interim Field Guidance and 1999 NPRM, with ''long-term institutionalization at government expense,'' in order to better describe the specific types of services covered and the duration for receiving them. Consistent with the 1999 Interim Field Guidance and 1999 NPRM, long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods or for rehabilitation purposes, as discussed further below.

Institutions assume total care of the basic living requirements of individuals who are admitted, including room and board.[411] Such long-term institutionalization at government expense (at any level of government) is the only non-cash benefit that would be considered under this rule. As discussed above, when developing the 1999 Interim Field Guidance and NPRM, the former INS consulted with Federal benefit-granting agencies such as HHS. In its consultation letter, HHS stated that non-cash benefits should generally be excluded from consideration. However, it noted that the one exception in which receipt of non-cash benefits would indicate that an individual is primarily dependent on government assistance for subsistence, and therefore would potentially be a public charge, is the case of an individual permanently residing in a long-term institution and who is relying on government assistance for those long-term care services. In such a case, all of that individual's basic subsistence needs are assumed by the institution.[412]

''Long-term institutionalization'' would be the only category of Medicaid-funded services to be considered in public charge inadmissibility determinations.[413] The 1999 Interim Field Guidance indicates that ''short term rehabilitation services'' are not to be considered for public charge purposes, but it does not otherwise describe the length of stay that is relevant for a public charge determination. Generally, DHS considers ''long-term institutionalization'' to be characterized by uninterrupted, extended periods of stay in an institution, such as a nursing home or a mental health institution. Under this approach, DHS, for example, would not consider a person to be institutionalized long term if that person had sporadic stays in a mental health institution, where the person was discharged after each stay. On the other hand, DHS would consider a person to be institutionalized long term if the person remained in the institution over a long period of time, even if that period included off-site trips or visits without discharge. Therefore, for purposes of this rulemaking, DHS is considering whether to codify this approach in a final rule, and whether to reference a specific length of time in the final rule or associated guidance. In considering such an approach, DHS welcomes the

[409] *See* 64 FR 28676, 28678–28679 (May 26, 1999).

[410] Section 1905(a) of the Social Security Act specifies that medical assistance in the Medicaid program does not include ''care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental diseases.'' Institutions for mental diseases are defined at section 1905(i) of the Social Security Act as ''a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases.'' While the Federal Government is not incurring a financial obligation for Medicaid beneficiaries in institutions for mental diseases, with specified exceptions, State governments are responsible for the cost of services provided to beneficiaries in these settings.

[411] *See* Ctrs. For Medicare & Medicaid Servs., *Institutional Long Term Care,* available at *https://www.medicaid.gov/medicaid/ltss/institutional/index.html* (accessed Dec. 13, 2021). *See also* 42 CFR 435.700 *et seq.*

[412] *See* HHS letter in 64 FR 28676, 28687 (May 26, 1999).

[413] Defined as institutional services under sec. 1905(a) of the Social Security Act.

submission of data on lengths of stay for long-term care in a range of institutional settings.[414]

Although the 2019 Final Rule required all Medicaid benefits (with specified exceptions) to be taken into account in public charge determinations, as indicated above, that is not the approach DHS is proposing here. Rather, DHS proposes an approach that is consistent with the 1999 Interim Field Guidance and 1999 NPRM on the scope of impact of Medicaid benefits. Also consistent with the 1999 Interim Field Guidance and the 1999 NPRM, the consideration of long-term institutionalization would not include the prior or current receipt of, or eligibility for, home and community-based services (HCBS),[415] even if those are offered at public expense, including through Medicaid.

In contrast to institutional services, Medicaid-funded HCBS help older adults and people with disabilities live, work, and fully participate in their communities.[416] These services and supports can promote employment[417] and decrease reliance on costly government-funded institutional care. For instance, HCBS meets the needs of beneficiaries at a fraction of the cost of long-term institutional care.[418] Unlike Medicaid-funded institutional services, Medicaid-funded HCBS do not include payments for room and board, and therefore do not provide the total care for basic needs provided by institutions. Medicaid is by far the largest provider of HCBS; Medicare and private health insurance coverage generally do not cover these services.[419] The vast majority of public comments received in response to the 2021 ANPRM supported excluding past or current use, or eligibility for, HCBS from the public charge determination.

This approach is also supported by HHS. In its on-the-record consultation letter, HHS encouraged DHS to ''consider clarifications to its public-charge framework that would account for advancements over the last two decades in the way that care is provided to people with disabilities and in the laws that protect such individuals.'' Specifically, HHS suggested that HCBS should not be considered in public charge inadmissibility determinations. HHS affirmed, as discussed above, that ''HCBS help older adults and persons with disabilities live, work, and fully participate in their communities, promoting employment and decreasing reliance on costly government-funded institutional care.'' The HHS letter also distinguished HCBS from long-term institutionalization at government expense by stating that HCBS do not provide ''total care for basic needs'' because they do not pay for room and board.

In its letter, HHS also encouraged DHS to take into account ''legal developments in the application of Section 504 since 1999,'' including looking at whether a person might have been institutionalized at government expense in violation of their rights.

As a departure from the 1999 Interim Field Guidance and the 1999 NPRM, in this proposed rule, DHS also recognizes that there are some circumstances where an individual may be institutionalized long-term in violation of Federal anti-discrimination laws, including the Americans with Disabilities Act (ADA) and Section 504. The ADA requires public entities, and Section 504 requires recipients of Federal financial assistance, to provide services to individuals in the most integrated setting appropriate to their needs.[420] In 1999, the Supreme Court in *Olmstead* v. *L.C.*,[421] held that unjustified institutionalization of individuals with disabilities by a public entity is a form of discrimination under the ADA and Section 504. Given the significant advancements in the availability of Medicaid-funded HCBS since the 1999 Interim Field Guidance was issued,[422] individuals who previously experienced long-term institutionalization may not need long-term institutionalization in the future. The public charge ground of inadmissibility is designed to render inadmissible those persons who, based on their own circumstances, would need to rely on the government for subsistence, and not those persons who might be confined in an institution without justification. The possibility that an individual will be confined without justification thus should not contribute to the likelihood that the person will be a public charge, and to this end, DHS proposes to direct adjudicators who are assessing the probative value of past or current institutionalization to take into account, when applicable and in the totality of the circumstances, any evidence that past or current institutionalization is in violation of Federal law, including the Americans with Disabilities Act or the Rehabilitation Act.[423] DHS seeks comment about what specific types of evidence it should consider for this purpose.

As discussed in more detail in Section D (detailing factors DHS would take into account when making a public charge determination), DHS also clarifies that the presence of a disability, as defined by Section 504, or any other medical condition is not alone a sufficient basis to determine that a noncitizen is likely at any time to become a public charge,

[414] However, as DHS notes later, given advances in alternatives to receiving care in institutional settings, prior receipt of long-term institutional services, even for extended periods of time, is not necessarily determinative of requiring institutional care in the future. DHS would always consider past or current receipt of long-term institutional services in the totality of the circumstances.

[415] HCBS provide opportunities for individuals with disabilities, such as intellectual or developmental disabilities, physical disabilities, and/or mental illnesses to receive services in their own home or community rather than in institutions. *See https://www.medicaid.gov/medicaid/home-community-based-services/index.html* (accessed Dec. 28, 2021).

[416] See Kaiser Family Foundation, Medicaid Beneficiaries Who Need Home and Community-Based Services (Mar. 2014), *available at https://www.kff.org/wp-content/uploads/2014/03/8568-medicaid-beneficiaries-who-need-home-and-community-based-servcies.pdf* (accessed Feb. 1, 2022).

[417] *See https://www.medicaid.gov/medicaid/long-term-services-supports/employment-initiatives/employment-hcbs/index.html* (describing Medicaid HCBS supports for employment) (accessed Jan. 26, 2021); *See also https://www.macpac.gov/wp-content/uploads/2018/07/The-Role-of-Medicaid-in-Supporting-Employment.pdf* (accessed Jan. 26, 2021).

[418] *See, e.g.,* HHS, Report to the President and Congress: The Money Follows the Person Rebalancing Demonstration (2017), *https://www.medicaid.gov/sites/default/files/2019-12/mfp-rtc.pdf* (accessed Jan. 27, 2022) (''On average, per-beneficiary per-month expenditures . . . declined by $1,840 (23 percent) among older adults transitioning from nursing homes . . . which translates to average cost savings for Medicaid and Medicare programs of $22,080 during the first year after the transition to home and community-based LTSS'').

[419] Kaiser Family Foundation, Medicaid Home and Community-Based Services Enrollment and Spending (Feb. 4, 2020), available at *https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/.*

[420] *See* Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.* (DOJ Olmstead Statement), available at *https://www.ada.gov/olmstead/q&a_olmstead.htm.*

[421] 527 U.S. 581 (1999).

[422] For example, Congress has expanded access to HCBS as an alternative to long-term institutionalization since 1999 by establishing a number of new programs, including the Money Follows the Person program and the Balancing Incentive Program, and new Medicaid State plan authorities, including Community First Choice (42 U.S.C. 1396n(k)) and the HCBS State Plan Option under 42 U.S.C. 1396n(i). Most recently, Congress provided increased funding to expand HCBS in the American Rescue Plan. These programs are in addition to the HCBS waiver program under 42 U.S.C. 1396n(c), first authorized in the Social Security Act in the early 1980s. As a result of a combination of these new HCBS programs and authorities and the Supreme Court's *Olmstead* decision in 1999, States have expanded HCBS. *See, e.g.,* CMS Long Term Services and Supports Rebalancing Toolkit, available at *https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/ltss-rebalancing-toolkit.pdf.*

[423] *See* proposed 8 CFR 212.22(a)(3).

including that the individual is likely to require long-term institutionalization at government expense. Instead, under this proposed rule, DHS would, in the totality of the circumstances, take into account all of the statutory minimum factors, including the applicant's health, as well as the sufficient Affidavit of Support Under Section 213A of the INA, if required, in determining the noncitizen's likelihood at any time of becoming a public charge.

5. Receipt (of Public Benefits)

DHS is proposing to define ''receipt (of public benefits)'' separately from its definition of ''likely at any time to become a public charge'' and in addition to defining the universe of public benefits that would be considered in public charge inadmissibility determinations.[424] In this definition, DHS makes clear that the receipt of public benefits occurs when a public benefit-granting agency provides public benefits to a noncitizen, but only where the noncitizen is listed as a beneficiary. In addition, and similarly to the 2019 Final Rule,[425] applying for a public benefit on one's own behalf or on behalf of another would not constitute receipt of public benefits by the noncitizen applicant, nor would approval for future receipt of a public benefit on the noncitizen's own behalf or on behalf of another. Finally, this definition would make clear that the noncitizen's receipt of public benefits solely on behalf of another, or the receipt of public benefits by another individual (even if the noncitizen assists in the application process), would also not constitute receipt of public benefits by the noncitizen. This approach differs slightly from the approach proposed in the 1999 NPRM and taken in the 1999 Interim Field Guidance under which DHS considers the receipt of (covered) public benefits received by relatives but only where such benefits constitute the sole source of support for the noncitizen, and only along with other factors in the totality of the circumstances.[426] DHS believes that this departure is necessary to mitigate significant chilling effects observed by DHS following the 2019 Final Rule.

With the inclusion of definitions of ''public cash assistance for income maintenance'' and ''long-term institutionalization at government expense'' DHS is proposing to specifically address the public benefits that would be considered in public charge inadmissibility determinations, *i.e.,* cash assistance for income maintenance and long-term institutionalization at government expense. Other public assistance programs, including SNAP and Medicaid (other than Medicaid payment for long-term institutionalization at government expense), would not be included.

This proposal was informed by public comments received on the ANPRM. Generally, commenters strongly supported excluding from consideration public benefits received by family members from consideration in public charge inadmissibility determinations. These commenters strongly supported clarifying the definition of receipt in rulemaking to limit confusion and potential disenrollment effects.

Due to the wide variety of programs that provide or fund public cash assistance for income maintenance and long-term institutionalization at government expense, and the varying requirements and procedures for such programs, individuals may be confused about whether their or their family members' participation in or contact with such programs in the past, currently, or in the future would be considered ''receipt'' of such benefits under this proposed rule. DHS believes that this definition, if finalized, would help alleviate such confusion and unintended chilling effects that resulted from the 2019 Final Rule by clarifying that only the receipt of specific benefits covered by the rule, only by the noncitizen applying for the immigration benefit, and only where such noncitizen is a named beneficiary would be taken into consideration. By extension, DHS would not consider public benefits received by the noncitizen's relatives (including U.S. citizen children or relatives).

DHS welcomes public comments on the most effective ways for DHS to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS's consideration of past or current receipt of SSI, TANF, or Medicaid (only for long-term institutionalization at government expense) would be in the totality of the noncitizen's circumstances, and that such receipt may result in a determination that an applicant is likely at any time to become a public charge, but would not necessarily result in such a determination in all cases.

In addition, as discussed elsewhere in this preamble, DHS welcomes public comments regarding the most effective ways to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS would only consider past or current receipt of SSI, TANF for cash assistance for income maintenance, or Medicaid (only for long-term institutionalization at government expense) by those categories of noncitizens identified in Table 3, above. For instance, DHS welcomes comments on how to communicate to parents of U.S. citizen children that the receipt of benefits by such children would not be considered as part of a public charge inadmissibility determination for the parents.

6. Government

DHS's proposed definition of ''likely at any time to become a public charge''[427] identifies the term ''government'' as the entity on which the noncitizen may become primarily dependent, as evidenced by the receipt of public cash assistance for income maintenance or long-term institutionalization. Therefore, DHS proposes to define this term as any Federal, State, Tribal, territorial, or local government entity or entities of the United States.[428] This definition would help to identify the universe of public cash assistance and long-term institutionalization programs DHS would consider in public charge inadmissibility determinations.

The 1999 NPRM defined government as any Federal, State, or local government entity or entities of the United States.[429] The 1999 NPRM does not explain the basis for the definition, but both the 1999 Interim Field Guidance and the 1999 NPRM suggest that the definition for public charge is tied to the fact that the types of benefits that are indicative of primary dependence on the government for subsistence are public cash assistance for income maintenance provided by Federal, State, and local benefits-granting agencies as well as institutionalization at Federal, State, and local entities' expense.[430] As a result, then-INS provided a definition for government to explain the types of benefits that would render an ''alien'' ''likely to become (for admission/adjustment purposes) primarily

[424] *See* proposed 8 CFR 212.21(d), (a), (b) and (c), respectively.

[425] *See* 84 FR 41292, 41502 (Aug. 14, 2019).

[426] *See* 64 FR 28676, 28683 (May 26, 1999). *See* 64 FR 28689, 28691–28692 (May 26,1999).

[427] *See* proposed 8 CFR 212.21(a) ''Likely at any time to become a public charge means likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.''

[428] *See* proposed 8 CFR 212.21(e).

[429] 64 FR 28676, 28681 (May 26, 1999).

[430] 64 FR 28689, 28692 (May 26, 1999); 64 FR 28676, 28676 (May 26, 1999).

dependent on the government for subsistence.'' [431]

The 2019 Final Rule, however, did not define ''government.'' In that rule, DHS replaced the 1999 definition of public charge with a definition that did not use the term government and did not tie the definition to primary dependence on the government for subsistence.[432] As such, there was no need to provide a definition for government in that rule.

As noted above, DHS now proposes to codify the primary dependence framework reflected in the 1999 Interim Field Guidance and the 1999 NPRM and proposes to tie the definition of ''likely at any time to become a public charge'' to the likelihood of receiving certain government assistance. As was the case in 1999, the proper focus of the inquiry is on the public benefits programs that are evidence of dependence. DHS believes that, in addition to Federal cash assistance programs—SSI and TANF—the State, Tribal, territorial, and local programs that provide comparable cash assistance for income maintenance constitute such evidence of dependence. Cash assistance for income maintenance and long-term institutionalization provided by Federal, State, Tribal, territorial, and local entities remain the ''best evidence of whether an alien is primarily dependent on the government for subsistence.'' [433]

As noted above, some commenters to the ANPRM suggested limiting the definition of government to only the Federal Government for purposes of the public charge ground of inadmissibility.[434] However, DHS currently believes that it is appropriate to use a definition of government that includes all U.S. government entities. For much of the time that the concept of public charge has been part of our immigration statutes, States, Tribes, territories, and localities provided much of the public support available to noncitizens. The Federal Government's role in providing such benefits expanded in response to the Great Depression in the 1930s and in the Great Society programs of the 1960s.[435] Even with this now more significant Federal role, the social safety net in the United States continues to consist of a variety of Federal, State, Tribal, territorial, and local programs that operate collaboratively to provide support for individuals. These non-Federal programs play an important role and are interwoven with Federal programs (some programs are funded by the Federal Government as well as States, Tribes, territories, and localities).

Moreover, there are provisions of law that demonstrate Congressional concern not only with noncitizens' receipt of Federal public benefits, but also noncitizens' receipt of State, Tribal, territorial, and local public benefits. For example, in addition to codifying Federal deeming provisions in 8 U.S.C. 1631, Congress included State ''deeming'' provisions in 8 U.S.C. 1632, which allow States to consider the income and resources of a noncitizen's sponsor and spouse in ''determining the eligibility and the amount of benefits'' of a noncitizen.

Additionally, the INA includes a number of provisions that focus on reimbursing or otherwise holding harmless Federal, State, Tribal, territorial, and local entities. For example, the public charge bond provisions of section 213 of the INA, 8 U.S.C. 1183, are intended to hold ''States, territories, counties, towns, municipalities, and districts'' of the United States ''harmless against such alien becoming a public charge'' and allow any ''State, territory, district, county, town, or municipality'' to recover the costs of public benefits that they have provided from the bond by bringing suit. Under section 213A(b)(1) of the INA, 8 U.S.C. 1183a(b)(1), if a sponsored ''alien'' receives any means-tested public benefit while the sponsor obligations of the Affidavit of Support Under Section 213A of the INA are in effect, ''the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor.''

Consistent with Congress' focus on benefits provided by Federal, State, Tribal, territorial, and local entities, and its focus on reimbursing and holding harmless those entities, DHS believes that it is appropriate and consistent with Congressional purpose to define government to ''mean[ ] any Federal, State, Tribal, territorial, or local government entity or entities of the United States.'' [436] Furthermore, insofar as the focus of the public charge ground of inadmissibility and related statutory provisions appears to be minimizing the burden on the United States public,[437] DHS believes it reasonable to consider only expenditures by U.S. government entities, rather than foreign government entities, under the public charge ground of inadmissibility.

DHS welcomes public comments on whether DHS should define government in this rule and, if so, whether it should be limited to Federal, State, Tribal, territorial, and local entities, and why or why not. DHS also welcomes public comments on whether there is an alternative definition for government that better captures the benefits indicative of primary dependence for subsistence.

7. Additional Definitions

As explained more fully above, this rule proposes to define many of the terms defined in prior guidance or regulations, including ''likely at any time to become a public charge,'' [438] ''public cash assistance for income maintenance,'' [439] ''receipt (of public benefits),'' [440] and ''government,'' [441] while this rule does not propose to define other terms defined in previous rulemaking and policy efforts, such as ''public charge,'' [442] ''cash,'' [443] ''public benefit,'' [444] ''alien's household,'' [445] and ''primary caregiver'' [446] for purposes of this rule.[447] DHS welcomes comments on how, if at all, DHS should define ''alien's household'' for use in applying the statutory minimum factors, as it did in the 2019 Final Rule. Additionally, although this proposed rule would define ''public cash assistance for income maintenance,'' and explains in this preamble in the context of general assistance that it would consider benefits provided in the form of cash, check, or other money instrument but not in-kind benefits, it does not provide a definition for what is meant by the term ''cash'' as the 1999 NPRM included.[448] As a result, DHS welcomes comments on whether a separate definition for the term ''cash'' is needed to explain what type of payments constitute public cash assistance for income maintenance. DHS

[431] 64 FR 28689, 28689 (May 26, 1999).

[432] *See* 84 FR 41292 (Aug. 14, 2019).

[433] *See* 64 FR 28689, 28692 (May 26, 1999).

[434] *See, e.g.,* USCIS–2021–0013–0182, USCIS–2021–0013–0148, and USCIS–2021–0013–0080.

[435] *See* the Social Security Amendments of 1972, Public Law 92–603, 86 Stat. 1329 (Oct. 30, 1972), PRWORA, Public Law 104–193, 110 Stat. 2105 (Aug. 22, 1996), and the Social Security Amendments of 1965, Public Law 89–97, 79 Stat. 286 (July 30, 1965).

[436] *See* proposed 8 CFR 212.21(e).

[437] *See* 8 U.S.C. 1601(4).

[438] *See* proposed 8 CFR 212.21(a); 84 FR 41292, 41501 (Aug. 14, 2019).

[439] *See* proposed 8 CFR 212.21(b); 64 FR 28689, 28692 (May 26, 1999); 64 FR 28676, 28682 (May 26, 1999).

[440] *See* proposed 8 CFR 212.21(d); 84 FR 41292, 41502 (Aug. 14, 2019).

[441] *See* proposed 8 CFR 212.21(e); 64 FR 28676, 28681 (May 26, 1999).

[442] 84 FR 41292, 41501 (Aug. 14, 2019); 64 FR 28689, 28689 (May 26, 1999); 64 FR 28676, 28681 (May 26, 1999).

[443] *See* 64 FR 28676, 28681 (May 26, 1999).

[444] *See* 84 FR 41292, 41501 (Aug. 14, 2019).

[445] *See* 84 FR 41292, 41501–02 (Aug. 14, 2019).

[446] *See* 84 FR 41292, 41502 (Aug. 14, 2019).

[447] *See* proposed 8 CFR 212.21.

[448] *See* 64 FR 28676, 28681 (May 26, 1999).

also welcomes comments on any other definitions needed to explain or clarify the public charge inadmissibility determination.

D. Public Charge Inadmissibility Determination

1. Factors

a. Statutory Minimum Factors

Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.[449] The statute does not indicate the circumstances under which any of these factors are to be treated positively or negatively, how much weight the factors should be given, or what evidence or information is relevant to the each of the statutory minimum factors.

In the 1999 Interim Field Guidance, the former INS noted that officers must consider the mandatory statutory factors, and that ''[t]he existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge.'' [450] The guidance suggested that the factors would be either positive or negative,[451] but did not explain what evidence or information officers should consider in evaluating these factors listed in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), or the weight to be given to a particular factor, in the totality of the circumstances.[452]

In the 2019 Final Rule (that is no longer in effect), DHS also required officers to consider the mandatory statutory factors in the totality of the circumstances when assessing an applicant's likelihood of becoming a public charge at any time in the future.[453] That rule provided certain standards for officers to use in assessing each factor and also identified detailed evidence that USCIS deemed relevant for the consideration of these factors.[454] The 2019 Final Rule also required that applicants for adjustment of status submit Form I–944, Declaration of Self Sufficiency,[455] which imposed substantial burdens on the public and on DHS due to the nature and volume of the information collected as part of the required initial evidence, while ultimately resulting in few adverse public charge inadmissibility determinations during the time the rule was in effect.[456]

A number of the comments provided in response to the 2018 NPRM stated that the proposal would result in a high paperwork burden on applicants that could discourage eligible individuals from applying for adjustment of status.[457] Moreover, commenters responding to the ANPRM strongly opposed the reintroduction of Form I–944 due to its substantial evidentiary burdens, which resulted in high administrative costs for organizations assisting applicants to be able to understand, explain, and collect the required information. The commenters on the ANPRM also noted that the evidentiary requirements in the 2019 Final Rule, which required applicants to obtain and submit a great deal of documentation, were burdensome and in some cases duplicative.

DHS therefore proposes to maintain the longstanding and straightforward framework set forth in the 1999 Interim Field Guidance, in which officers consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, where required, in the totality of the circumstances, without separately codifying the standard and evidence required for each factor as was done in the 2019 Final Rule. This will reduce burdensome and unnecessary evidentiary and information collection requirements pertaining to the statutory minimum factors, which in turn will decrease the burdens on DHS when reviewing and evaluating information and evidence. Rather than creating a new form to collect information pertaining to the statutory minimum factors when an applicant applies for adjustment of status with USCIS, DHS will collect information relevant to the statutory minimum factors from existing information collections, *e.g.,* information pertaining to the health factor will be obtained from Form I–693, Report of Medical Examination and Vaccination Record, and DHS proposes adding new questions to the existing Form I–485 regarding the other statutory minimum factors. As with any benefit request, officers may request additional information or evidence relating to any of the statutory minimum factors as needed, on a case-by-case basis, when indicated by evidence in the record, including responses to questions on Form I–485 or other forms.[458]

DHS requests public comments on how each of the statutory minimum factors should be considered in the totality of the circumstances in a public charge inadmissibility determination. DHS is particularly interested in evidence and data that would inform to what extent each factor would impact whether a noncitizen is likely at any time to become a public charge, and how these factors can be considered without placing an unreasonable evidentiary burden on applicants for adjustment of status. In particular, DHS invites public comment on how it should define and apply family status; assets, resources, and financial status; and education and skills. DHS requested comments on this topic in the ANPRM. While many commenters on the ANPRM provided their thoughts on the statutory minimum factors, the commenters generally did not provide recommendations about the best way for DHS to define or apply the factors.[459] DHS therefore requests additional public input, noting, respectfully, that DHS cannot entertain requests to exclude from consideration any of the congressionally established statutory minimum factors.

DHS also requests public comments on the initial evidence applicants should provide regarding each of the statutory minimum factors. DHS is particularly interested in what specific questions should be included on the Form I–485, Application to Register

[449] *See* INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i). The statute also permits, but does not require, the consideration of a sufficient Affidavit of Support Under Section 213A of the INA, if required. *See* INA sec. 212(a)(40(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

[450] *See* 64 FR 28689, 28690 (May 26, 1999).

[451] *See* 64 FR 28689, 28689–90 (May 26, 1999).

[452] *See* 64 FR 28689, 28689–90 (May 26, 1999). The 1999 Interim Field Guidance included consideration of the past and present receipt of cash assistance for income maintenance and noted that less weight would be assigned the longer ago the benefits were received. 64 FR at 28690. The 1999 Interim Field Guidance also noted that applicants who received cash assistance for income maintenance could overcome such receipt by being employed full-time or having a sufficient Affidavit of Support Under Section 213A of the INA. 64 FR at 28690.

[453] *See* 84 FR 41292, 41307 (Aug. 14, 2019).

[454] *See* 84 FR 41292 (Aug. 14, 2019).

[455] *See* 84 FR 41292, 41507 (Aug. 14, 2019).

[456] As noted above, during the year during which DHS implemented the 2019 Final Rule that has been vacated, DHS only issued three denials, which were reopened and granted, and two Notices of Intent to Deny, which were rescinded. USCIS Field Operations Directorate (June 2021).

[457] *See, e.g.,* 84 FR 41292, 41315 (Aug. 14, 2019).

[458] *See* 8 CFR 103.2(b)(8).

[459] DHS received comments relating to specific factors and their possible negative effect on the public charge inadmissibility determination for certain populations, as well as comments requesting a lighter evidentiary burden. However, few commenters provided ideas for consideration of the statutory minimum factors or how information about the factors should be collected so as to minimize public burden.

Permanent Residence or Adjust Status, to document information and evidence relevant to the statutory minimum factors without placing an unreasonable evidentiary burden on the public or significantly delaying adjustment of status adjudications by USCIS.

b. Affidavit of Support Under Section 213A of the INA

IIRIRA amended the INA by setting forth requirements for submitting what would be an enforceable affidavit of support (*i.e.,* the current Affidavit of Support Under Section 213A of the INA). An Affidavit of Support Under Section 213A of the INA is a contract between the sponsor and the U.S. Government that imposes on the sponsor a legally enforceable obligation ''to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable.'' [460]

Under section 212(a)(4)(C) and (D) of the INA, 8 U.S.C. 1182(a)(4)(C) and (D), most family-based immigrants and some employment-based immigrants are required to submit an Affidavit of Support Under Section 213A of the INA executed by a sponsor to avoid being found inadmissible based on the public charge ground.[461] This requirement applies even if the officer would ordinarily find, after reviewing the statutory minimum factors, that the intending immigrant is not likely at any time to become a public charge.[462] Where such an Affidavit of Support Under Section 213A of the INA has been executed on an applicant's behalf, the statute permits DHS to consider it along with the statutory minimum factors in the public charge inadmissibility determination.[463]

A sufficient Affidavit of Support Under Section 213A of the INA does not, alone, result in a finding that a noncitizen is not likely at any time to become a public charge due to the statute's requirement to consider the statutory minimum factors.[464] Additionally, an Affidavit of Support Under Section 213A is not intended to guarantee that an intending immigrant will not become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense, but rather, to ensure that public benefit granting agencies could be reimbursed for certain aid provided to the sponsored noncitizen.[465]

Under the 1999 Interim Field Guidance, a sufficient Affidavit of Support Under Section 213A of the INA should be considered in the totality of the circumstances along with the statutory minimum factors in the public charge inadmissibility determination.[466] The 1999 Interim Field Guidance does not explain whether a required Affidavit of Support Under Section 213A of the INA is a positive factor or otherwise explain how an officer should consider the affidavit in the totality of the circumstances, but does imply that having a sufficient affidavit is a positive consideration in the totality of the circumstances.[467] The 1999 NPRM proposed that the officer ''may also consider any Affidavit of Support filed by your sponsor(s) on your behalf under section 213A of the Act and 8 CFR part 213a.'' [468] Under the 1999 NPRM, ''[n]o single factor, other than the lack of a sufficient Affidavit of Support as required by section 212(a)(4)(C) and (D) of the Act, will control this decision, including past or current receipt of public cash benefits, as described in paragraph (b) of this section.'' [469]

In the 2019 Final Rule, when a required sufficient Affidavit of Support Under Section 213A of the INA was submitted, DHS would consider the likelihood that the sponsor who executed the affidavit ''would actually provide the statutorily required amount of financial support to the alien, and any other related considerations.'' [470] The preamble to that rule noted that DHS generally considered a sufficient Affidavit of Support Under Section 213A of the INA to be a positive factor in the totality of the circumstances,[471] and when determining how much positive weight to give a sufficient affidavit in the totality of the circumstances, USCIS assessed the likelihood that the sponsor who executed the affidavit would actually provide financial support to the applicant by looking at the relationship between the sponsor and the applicant, whether they lived together, and whether the sponsor had submitted any Affidavit of Support Under Section 213A of the INA on behalf of other individuals.[472] However, under the 2019 Final Rule, a sufficient Affidavit of Support Under Section 213A of the INA would be a negative factor in the totality of the circumstances if the evidence reflected the sponsor's inability or unwillingness of the sponsor to financially support the noncitizen.[473] Nonetheless, under the 2019 Final Rule, DHS noted that a sufficient Affidavit of Support Under Section 213A of the INA would not alone be a sufficient basis to determine whether an applicant is likely at any time to become a public charge, as the presence of a sufficient affidavit does not eliminate the need to consider all of the statutory minimum factors in the totality of the circumstances.[474]

Under the statute, a sufficient Affidavit of Support Under Section 213A of the INA, alone, is not a sufficient basis to determine the likelihood at any time of becoming a public charge given that the statute requires DHS to consider the statutory minimum factors, and does not require the same for the affidavit.[475] An Affidavit of Support Under Section 213A of the INA is an enforceable contract and DHS believes that it is unnecessary to evaluate a sponsor's subjective intent to support the applicant and abide by the terms of the contract when making a public charge inadmissibility determination in the totality of the circumstances.[476] A sponsor has the burden under section 213A of the INA, 8 U.S.C. 1183a, to demonstrate that their Affidavit of Support Under Section 213A of the INA is sufficient. Congress established the

[460] INA sec. 213A(a)(1)(A), 8 U.S.C. 1183a(a)(1)(A). However, a sponsor who is on active duty (other than active duty for training) in the Armed Forces of the United States and filed a petition on behalf of a spouse or child only needs to demonstrate support equal to at least 100 percent of the Federal poverty line. *See* INA sec. 213A(f)(3), 8 U.S.C. 1183a(f)(3).

[461] INA sec. 213A, 8 U.S.C. 1183a(a)(1).

[462] *Ibid.*

[463] INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

[464] INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

[465] *See* H.R. Rep. No. 104–651, at 1449 (1996) (in explaining the provision, emphasizing that the Affidavit of Support Under Section 213A of the INA would permit benefit-providing agencies to seek reimbursement).

[466] 64 FR 28689, 28690 (May 26, 1999).

[467] 64 FR 28689, 28690 (May 26, 1999) (''For instance, a work authorized alien who has current full-time employment or an [Affidavit of Support] should be found admissible despite past receipt of cash public benefits, unless there are other adverse factors in the case.'') The 1999 Interim Field Guidance also states that ''[u]nder the new [affidavit of support] rules, all family-based immigrants (and some employment-based immigrants) will have a sponsor who has indicated an ability and willingness to come to [the immigrant's] assistance.'' 64 FR 28689, 28690 (May 26, 1999).

[468] 64 FR 28676, 28682 (May 26, 1999).

[469] *Ibid.*

[470] 84 FR 41292, 41440 (Aug. 14, 2019).

[471] 84 FR 41292, 41197 (Aug. 14, 2019).

[472] 84 FR 41292, 41198 (Aug. 14, 2019).

[473] 84 FR 41292, 41440 (Aug. 14, 2019).

[474] 84 FR 41292, 41198 (Aug. 14, 2019). However, the statute requires a finding of inadmissibility on public charge grounds if the noncitizen is required to submit an affidavit of support and fails to do so. INA sec. 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D).

[475] 84 FR 41114, 41198 (Aug. 14, 2019).

[476] *See* INA sec. 213A, 8 U.S.C. 1183a. *See Erler* v. *Erler,* 824 F.3d 1173 (9th Cir. 2016); *Belevich* v. *Thomas,* 17 F.4th 1048 (11th Cir. 2021); *Wenfang Liu* v. *Mund,* 686 F.3d 418 (7th Cir. 2012).

requirements for a sponsor in INA 213A(f), 8 U.S.C. 1183a(f), and these requirements do not include a demonstration of the sponsor's subjective intent. Once DHS determines that an Affidavit of Support Under Section 213A of the INA is sufficient, it would be duplicative to reevaluate whether or not the sponsor's binding Affidavit of Support Under Section 213A of the INA is sufficient when conducting a public charge inadmissibility determination. DHS believes that such a reevaluation would create an unnecessary burden for DHS adjudicators and the public.

DHS believes that, in the context of public charge inadmissibility determinations, the approach taken in 1999 to consider only the existence of a sufficient Affidavit of Support Under Section 213A of the INA, when required, and not assess whether the sponsor who executed the affidavit would actually provide financial support to the noncitizen, gives proper consideration to such an affidavit, consistent with the statutory provision.

While the 1999 Interim Field Guidance did not expressly direct officers to favorably consider an Affidavit of Support Under Section 213A of the INA, DHS believes that treating a sufficient affidavit favorably was implied and is wholly consistent with the statute. DHS believes that treating an Affidavit of Support Under Section 213A of the INA favorably is supported by the fact that sponsored noncitizens are less likely to turn to the government first for financial support because they can and have been known to successfully enforce the statutory requirement that sponsors provide financial support to the sponsored noncitizen at the level required by statute for the period the obligation is in effect.[477] Additionally, DHS believes that treating a sufficient Affidavit of Support Under Section 213A of INA favorably is supported by the Federal and State deeming provisions of 8 U.S.C. 1631 and 1632, which may reduce the likelihood that a sponsored noncitizen would be eligible for a means-tested benefit, and therefore, less likely to become a public charge at any time in the future.

Accordingly, DHS proposes to favorably consider an Affidavit of Support Under Section 213A of the INA in the totality of the circumstances analysis, when required to be submitted under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D), as long as it meets the requirements of section 213A of the INA, 8 U.S.C. 1183a, and 8 CFR 213a.[478] DHS believes that, while a sufficient Affidavit of Support Under Section 213A does not, in and of itself, mean an intending immigrant is not likely at any time to become a public charge, the existence of such an affidavit is indeed relevant to making that determination and should be considered favorably (*i.e.,* a positive factor that makes an applicant less likely at any time to become a public charge in the totality of the circumstances).

c. DHS Welcomes Public Comments or Data Regarding The Connection Between Being a Sponsored Noncitizen Who Has Submitted a Sufficient Affidavit of Support Under Section 213A of the INA and the Likelihood of Being Primarily Dependent on the Government for Subsistence. Current/ Past Receipt of Public Benefits

The 1999 Interim Field Guidance, 1999 NPRM, and 2019 Final Rule all considered an applicant's past and current receipt of public benefits as part of the public charge inadmissibility determination, although the framework for considering past and current receipt of benefits differed.

Under the 1999 Interim Field Guidance[479] and 1999 NPRM,[480] current or past receipt of public cash assistance for income maintenance did not automatically make a noncitizen inadmissible as likely at any time to become a public charge, nor did past institutionalization for long-term care at government expense. Rather, an applicant's history of benefit receipt was one of the factors to be considered in the totality of the circumstances in a public charge inadmissibility determination. The longer ago an applicant received cash benefits or was institutionalized at government expense, the less weight the applicant's receipt of such benefits would be given as a predictor that the applicant would receive these benefits in the future.[481] Additionally, the length of time an applicant received benefits and the amount of benefits received are considered under the 1999 Interim Field Guidance.[482]

In the 2019 Final Rule, past and current receipt of public benefits were considered a negative factor in the totality of the circumstances.[483] Under the 2019 Final Rule, DHS considered whether the applicant had applied for, received, or been certified or approved to receive any of the defined public benefits.[484] Past or current receipt, as well as certification or approval to receive one or more of the defined public benefits, for more than 12 months in the aggregate within any 36-month period, beginning no earlier than 36 months before the application for admission or adjustment of status, was treated as a heavily weighted negative factor in the totality of the circumstances.[485]

DHS proposes to consider a noncitizen's current and past receipt of public cash assistance for income maintenance and long-term institutionalization at government expense in making a public charge inadmissibility determination in the totality of the circumstances. As stated earlier in this proposed rule, DHS believes that, by focusing on cash assistance for income maintenance or long-term institutionalization at government expense, DHS can identify those individuals who are likely to become primarily dependent on the government for subsistence, without interfering with other benefit programs that serve important public interests. When making a public charge inadmissibility determination, DHS will consider the amount, duration, and recency of receipt of such benefits.[486] For example, the longer ago a noncitizen received such benefits, the less likely such receipt helps predict future receipt of public benefits. By contrast, the longer a noncitizen has received such benefits in the past and the greater the amount of benefits, the stronger the implication that the noncitizen is likely to become a public charge. As DHS acknowledged above, given the significant advancements in the availability of Medicaid-funded HCBS since the 1999 Interim Field Guidance was issued,[487] individuals who

[477] *See* INA sec. 213A(a)(1)(A), 8 U.S.C. 1183a(a)(1)(A). *See e.g., Erler* v. *Erler,* 824 F.3d 1173 (9th Cir. 2016), *Belevich* v. *Thomas,* 17 F.4th 1048 (11th Cir. 2021), *Wenfang Liu* v. *Mund,* 686 F.3d 418 (7th Cir. 2012).

[478] *See* proposed 8 CFR 212.22(a)(2).

[479] 64 FR 28689, 28691 (May 26, 1999).

[480] 64 FR 28676, 28683 (May 26, 1999).

[481] 64 FR 28689, 28690 (May 26, 1999). 64 FR 28676, 28683 (May 26, 1999).

[482] *Ibid.*

[483] *See* 84 FR 41292, 41503–14504 (Aug. 14, 2019).

[484] *See* 84 FR 41292, 41503 (Aug. 14, 2019).

[485] *See* 84 FR 41292, 41504 (Aug. 14, 2019).

[486] *See* proposed 8 CFR 212.22(a)(3).

[487] For example, Congress has greatly expanded access to HCBS since 1999 by establishing a number of new programs, including the Money Follows the Person program and the Balancing Incentive Program, and new Medicaid State plan authorities, including Community First Choice (42 U.S.C. 1396n(k)) and the HCBS State Plan Option under 42 U.S.C. 1396n(i). Most recently, Congress provided increased funding to expand HCBS in the American Rescue Plan. These programs are in addition to the HCBS waiver program under 42 U.S.C. 1396n(c), first authorized in the Social Security Act in the early 1980s. As a result of a

Continued

previously experienced long-term institutionalization may not need long-term institutionalization in the future, and may instead be able to rely on their own resources for housing and other expenses while using Medicaid-funded HCBS only as a supplement. DHS also intends to analyze the available empirical data relating to public benefits use to determine the predictive value of past and current receipt of benefits in making public charge inadmissibility determinations.

Under this proposed rule, current and/or past receipt of these benefits, alone, would not be a sufficient basis to determine whether an applicant is likely at any time to become a public charge.[488] DHS will consider the current and/or past receipt of these benefits in the totality of the noncitizen's circumstances, along with the other factors. DHS will consider the amount and duration of receipt, as well as how recently the noncitizen received the benefits, and for long-term institutionalization, evidence submitted by the applicant that the applicant's institutionalization violates Federal law, including the Americans with Disabilities Act or the Rehabilitation Act. However, current and/or past receipt of these benefits will not alone be a sufficient basis to determine whether the noncitizen is likely at any time to become a public charge.

This proposed approach is consistent with the 1999 Interim Field Guidance[489] and aspects of the 2019 Final Rule. INS and DHS have consistently considered the past and current receipt of benefits in making public charge inadmissibility determinations and have consistently considered such receipt in the totality of the circumstances, taking into account the amount, duration, and recency of the receipt. INS and DHS have also consistently stated that the past or current receipt of benefits alone is not a sufficient basis to determine whether an applicant is likely at any time to become a public charge.[490] However, unlike in the 2019 Final Rule, DHS is not proposing to add any heavily weighted negative factors because DHS has determined that each public charge inadmissibility determination is heavily fact-dependent and factors that may weigh heavily in one case may not have equal weight in another depending on the totality of the applicant's circumstances. Because DHS has proposed to consider the statutory minimum factors in their totality, without separately defining each factor and its weight, DHS proposes to similarly consider current and past benefit use as one element within the totality of the circumstances.

d. Disability Alone Is Not a Sufficient Basis To Determine Whether an Applicant Is Likely at Any Time To Become a Public Charge

DHS proposes to clarify that the presence of a disability alone is not a sufficient basis to determine whether a noncitizen is likely at any time to become a public charge.[491] DHS will not presume that an individual having a disability in and of itself means that the individual is in poor health or is likely to receive cash assistance for income maintenance or require long-term institutionalization at government expense, or otherwise presume that their disability in and of itself negatively impacts any of the other statutory minimum factors. For example, many disabilities do not impact an individual's health or require extensive medical care, and the vast majority of people with disabilities do not use institutional care.[492]

Section 504 of the Rehabilitation Act prohibits discrimination against a qualified individual with a disability solely on the basis of that disability under any program or activity receiving Federal financial assistance or under any federally conducted program or activity.[493] Under Section 504, an individual with a disability is defined as a person with: (i) A physical or mental impairment that substantially limits one or more major life activities; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment.[494] An individual with a disability is a ''qualified'' individual with a disability if they meet the essential eligibility requirements for the receipt of the services they are seeking.[495] A fundamental purpose of Section 504 is to prohibit decisions on the basis of ''prejudice, stereotypes, or unfounded fear'' about people with disabilities.[496] Unfounded assumptions about people with disabilities, including that they are in poor health or are unable to work, are both pervasive and inaccurate.[497]

The 1999 NPRM did not directly address how the presence of disability should be considered in a public charge determination and the 1999 Interim Field Guidance only references disability in the context of citing a 1964 Attorney General decision in *Matter of Martinez-Lopez* relating to the totality of circumstances test.[498] Under the 2019 Final Rule, discussed in detail in the background section, while disability was not explicitly mentioned in the regulatory text, a number of negatively weighted factors impacted people with disabilities. For example, as part of the health factor, DHS treated an applicant's diagnosis with a medical condition that was likely to require extensive medical treatment or institutionalization or that would interfere with the applicant's ability to care for themself, to attend school, or to work upon admission or adjustment of status as a heavily weighted negative factor in the totality

combination of these new HCBS programs and authorities and the Supreme Court's *Olmstead* decision in 1999, States have significantly expanded HCBS. *See, e.g.,* CMS Long Term Services and Supports Rebalancing Toolkit, available at *https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/ltss-rebalancing-toolkit.pdf.*

[488] *See* proposed 8 CFR 212.22(a)(3).

[489] *See* 64 FR 28689 (May 26, 1999).

[490] *See* 64 FR 28689, 28690 (May 26, 1999); 64 FR 28676, 28683 (May 26, 1999); 83 FR 51114, 51178 (Oct. 10, 2018); 84 FR 41292, 41363 (Aug. 14, 2019).

[491] *See* proposed 8 CFR 212.22(a)(4).

[492] One analysis of American Community Survey data found that average State percentages from 2012 to 2016 of people with disabilities living in institutions were very low, ranging from 3.2 percent for Nevada to a high of 8.6 percent in North Dakota. ADA Participatory Action Research Consortium (ADA–PARC), Percentage of People with Disabilities Living in an Institution, 2012 to 16, available at *https://www.centerondisability.org/ada_parc/utils/indicators.php?id=1* (accessed Jan. 27, 2022).

[493] 29 U.S.C. 794(a).

[494] 29 U.S.C. 705(20)(B).

[495] 45 CFR 84.4(l)(4) (using the older term ''qualified handicapped person''); 6 CFI5.3(e)(2).

[496] *Sch. Bd. of Nassau Cty.* v. *Arline,* 480 U.S. 273, 287 (1987).

[497] ''27 years after [the ADA's] passage, people with disabilities still face many outdated attitudes and stereotypes. For example, some believe that people with disabilities cannot live independently or contribute meaningfully to the workforce or their communities.'' National Council on Disability, *National Disability Policy: A Progress Report* (Oct. 2017), at 52, available at *https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf (accessed Feb. 4, 2022).*

[498] In *Matter of Martinez-Lopez,* 10 I&N Dec. 409, 421–422 (BIA 1962; Att'y Gen. 1964), the Attorney General opined that the statute requires a specific circumstance suggesting the individual may become a public charge to be present, not merely ''a showing of a possibility that an alien will require public support.'' *Id.* at 421. Although the individual at issue in the decision did not have a disability, the decision contains a reference to disability, among other factors, that may be such a circumstance. *Id.* (''[s]ome specific circumstances, such as mental or physical disability . . . or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present.''). The Attorney General did not indicate that *any* disability reasonably tends to show that an individual is likely to become a public charge, irrespective of the particular disability or the totality of the individual's circumstances. Instead, the Attorney General called for a case-by-case assessment of the individual's particular circumstances, including whether a specific disability might have a bearing on the public charge inadmissibility determination. This interpretation is consistent with the approach taken in this proposed rule. DHS notes that this decision predates Section 504 by nearly a decade and the ADA by over 25 years.

of the circumstances.[499] All of these conditions constitute disabilities under Section 504.[500] Additionally, under the 2019 Final Rule, an applicant with a disability could have other heavily weighted negative factors present in their case, including if they received disability services through Medicaid.[501]

As discussed previously, several lawsuits challenged the 2019 Final Rule as violating Section 504 of the Rehabilitation Act. The U.S. Court of Appeals for the Seventh Circuit found that ''the [r]ule disproportionately burdens disabled people and in many instances [the rule] makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge.'' [502] For example, the court noted that many people with disabilities would be subject to a heavily weighted negative factor.[503] The court also pointed out that people with disabilities would be likely to be subject to a number of other heavily weighted negative factors because only Medicaid, and not private health insurance, covers the benefits and services that help people with disabilities work and thus avoid becoming public charges.[504] Under the 2019 Final Rule, using Medicaid for more than 12 months in the aggregate within any 36-month period was a heavily weighted negative factor. Yet, if a noncitizen with a disability had forgone the receipt of Medicaid to avoid the 2019 Final Rule's negative immigration consequences, and therefore could not obtain the services that are only available with Medicaid coverage to allow that individual to work or attend school, the noncitizen could potentially be subject to the heavily weighted negative factor addressing current employment, lack of employment history or prospect of future employment.[505] In addition, causing noncitizens to avoid the very supplemental benefits that will contribute to their health and self-sufficiency is inconsistent with Congress' purpose.

Taking into consideration these issues identified in litigation, in the ANPRM DHS requested comment on the treatment of disability in DHS's analysis of the health factor in light of Section 504's prohibition against discrimination on the basis of disability.[506] DHS received extensive comment on this topic. For example, in a joint comment letter, 17 organizations representing people with disabilities wrote ''disability equates neither to poor health nor long-term primary dependence on the government for subsistence'' and ''many people with disabilities live healthy lives and support themselves.'' Another commentor stressed that disability is a ''life condition,'' not necessarily a health condition, and that the presence of a disability does not equate to having a chronic medical condition or the need for ongoing medical treatment, including institutionalization.

In light of these comments and the relevant authorities and case law, DHS believes that clarifying that disability alone is not a sufficient basis to determine whether an applicant is likely at any time to become a public charge is necessary and appropriate. This clarification reflects DHS's consideration of the extensive input of commentors to the ANPRM and is consistent with the proposed totality of the circumstances framework set forth in this proposed rule.

2. Totality of the Circumstances

DHS proposes that the ''[t]he determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances.'' [507] The proposed regulation further states that none of the statutory minimum factors other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, ''should be the sole criterion for determining if an alien is likely to become a public charge'' [508] and that ''DHS may periodically issue guidance to adjudicators to inform the totality of the circumstances assessment. Such guidance will consider how these factors affect the likelihood that the alien will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.'' [509]

Under section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), officers are required, at a minimum, to consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills, and may consider a sufficient Affidavit of Support Under Section 213A of the INA, where required.[510] Although the statute does not expressly include a totality of the circumstances test, as noted in the 1999 Interim Field Guidance, this test ''has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986.'' [511] Federal courts have also endorsed this ''totality of the circumstances'' test.[512] As a result, the 1999 Interim Field Guidance required officers to make public charge inadmissibility determinations in the totality of the circumstances and indicated that no single factor, other than the lack of a sufficient Affidavit of Support, when required, would control the decision.[513]

Consistent with this historical approach to public charge inadmissibility determinations, the 2019 Final Rule also adopted a totality of the circumstances approach.[514] However, in addition to the prospective determination based on the totality of the circumstances framework, in which the officer was required to weigh ''all factors that are relevant to whether the alien is more likely than not at any time in the future'' to become a public charge, the totality test in that rule detailed standards and new evidentiary requirements related to the factors that went into the analysis, designating some factors as heavily weighted positive or heavily weighted negative factors.[515]

In addition to the evidentiary and paperwork burdens established by the 2019 Final Rule and discussed above, DHS has determined that the totality of the circumstances framework established by the 2019 Final Rule was overly prescriptive. As reflected in Congress's instruction that several factors specific to the applicant must be considered, each public charge

[499] *See* 84 FR 41292, 41502 (Aug. 14, 2019).

[500] Section 504 defines ''disability'' as impairments that substantially limit one or more major life activities, including caring for oneself, working, or learning. 42 U.S.C. 12102(2)(A).

[501] *See* 84 FR 41292, 41504 (Aug. 14, 2019).

[502] *Cook County,* 962 F.3d at 227–228 (7th Cir. 2020).

[503] *Cook County,* 962 F.3d at 227–228 (7th Cir. 2020).

[504] *Cook County,* 962 F.3d at 227–228 (7th Cir. 2020).

[505] *Cook County,* 962 F.3d at 227–228 (7th Cir. 2020) (''The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment.'').

[506] 86 FR 47025, 47029 (Aug. 23, 2021).

[507] Proposed 8 CFR 212.22(b).

[508] *Ibid.*

[509] *Ibid.*

[510] Section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B).

[511] *See* 64 FR 28689, 28690 (May 26, 1999) citing *Zambrano* v. *INS,* 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds,* 509 U.S. 918) (1993).

[512] *See, e.g., Zambrano* v. *INS,* 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds,* 509 U.S. 918 (1993).

[513] 64 FR 28689, 28690 (May 26, 1999).

[514] 84 FR 41292, 41502 (Aug. 14, 2019).

[515] 84 FR 41292, 41295 (Aug. 14, 2019).

inadmissibility determination must be individualized and based on the evidence presented in the specific case, and the relative weight of each factor and associated evidence is necessarily determined by the presence or absence of specific facts. Consequently, the designation of some factors as *always* ''heavily weighted'' suggested a level of mathematical precision that would be unfounded and inconsistent with the long-standing standard of considering the totality of the individual's circumstances. DHS may periodically issue guidance that will consider how the factors affect the likelihood that a noncitizen will become a public charge at any time based on an empirical analysis of the best available data as appropriate. In light of this intention to issue guidance to generally inform the predictive nature of the factors as an objective aspect of the analysis, as discussed below, declining to take this categorical approach of weighting the relevant factors would best enable adjudicators to fully consider the applicant's individual circumstances and evidence presented, thereby better achieving the goals of the public charge inadmissibility determination. DHS's proposal therefore includes elements consistent with the standard previously in place for over 20 years, under which officers will consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA (when required) in the totality of the circumstances, while also introducing an empirical element as appropriate.

In connection with the 2019 Final Rule, DHS received a public comment requesting that DHS establish a base rate of likelihood that a noncitizen would become a public charge based on empirical evidence.[516] In response to the comment, DHS explained the data and practical limitations it encountered in declining to base the totality of the circumstances on an empirical data model.[517] As mentioned above, DHS is now proposing that USCIS would conduct empirical analyses of the best available data as appropriate to inform the agency on how the factors included in the totality of circumstances would affect an applicant's likelihood of becoming a public charge. This analysis may include Survey of Income and Program Participation (SIPP) panel data and other appropriate data sources USCIS identifies for this purpose.[518]

USCIS is not proposing to designate a specific empirical model for use in the adjudication process in order to predict precise probabilities of becoming a public charge for individual applicants. In addition, DHS is not proposing a fixed data source or methodology because the availability of data, as well as the efficacy of empirical models, are continuously evolving. DHS intends for any empirical analysis it conducts to inform the predictive nature of the various factors to be taken into consideration in conjunction with the assessment of the applicant's individual circumstances when making a public charge inadmissibility determination. In that vein, DHS welcomes public comments on the data sources that may be best suited to this type of analysis or studies that may inform USCIS' development of the methodology, as well as any feedback regarding how empirical data should be used in making the predictive determination of whether a noncitizen is likely to become a public charge at any time in the totality of the circumstances.

3. Denial Decision

In making a public charge inadmissibility determination, officers are required to consider the statutory minimum factors and may consider the Affidavit of Support Under Section 213A of the INA, if required.[519]

The 1999 Interim Field Guidance required that every denial decision based on the public charge ground of inadmissibility ''reflect consideration of each of these factors and specifically articulate the reasons for the officer's determination.'' [520] While the 2019 Final Rule continued to follow a totality of the circumstances approach to public charge inadmissibility determinations in which officers were required to assess ''the totality of the alien's circumstances by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to'' become a public charge,[521] it did not state that denials based on the public charge ground of inadmissibility must include a detailed discussion of all of the factors. There is a general regulatory requirement, however, that USCIS officers ''explain in writing the specific reasons for a denial.'' [522] This requirement applies to all applications and petitions adjudicated by USCIS, including denials based on a public charge inadmissibility determination.[523]

DHS is now proposing to codify the language set forth in the 1999 Interim Field Guidance that reiterated more specifically the general requirement that every written denial decision issued by USCIS based on the public charge ground of inadmissibility include a discussion of each of the factors. DHS proposes that ''[e]very written denial decision issued by USCIS based on the totality of the circumstances set forth in paragraph (b) of this section will reflect consideration of each of the factors outlined in paragraph (a) of this section and specifically articulate the reasons for the officer's determination.'' [524] Although existing DHS regulations and policy already require USCIS officers to specify in written denials the basis for the denial,[525] DHS believes that a provision explicitly requiring a discussion of the factors considered in the denial is consistent with the statute and is necessary to ensure that any denial based on this ground of inadmissibility is made on a case-by-case basis in light of the totality of the circumstances.

In response to the 2021 ANPRM, some commenters requested that applicants have a reasonable opportunity to present additional evidence related to their applications. DHS notes that DHS regulations and USCIS policy provide guidance to officers on situations when it is appropriate to issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) before denying an application, petition, or request. An officer should issue an RFE or NOID when the facts and the law warrant. However, an officer should issue a denial without first issuing an RFE or NOID if there would be no legal basis for approval or there is no possibility that additional information or explanation would establish a legal basis for approval.[526]

4. Exclusion From Consideration of Receipt of Certain Public Benefits

In the 2019 Final Rule, DHS excluded from consideration benefits provided under Medicaid for the treatment of an emergency medical condition, certain educational and school-based services, as well as Medicaid received by noncitizens under the age of 21, and pregnant persons.[527] DHS also excluded from consideration public benefits

[516] 84 FR 41292, 41400 (Aug. 14, 2019).

[517] *Ibid.*

[518] For more information about SIPP, *see https://www.census.gov/programs-surveys/sipp/about.html* (accessed Jan. 18, 2022).

[519] INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

[520] *See* 64 FR 28689 (May 26, 1999).

[521] *See* 84 FR 41292, 41502 (Aug. 14, 2009).

[522] 8 CFR 103.3(a)(1)(i).

[523] 8 CFR 103.3(a)(1)(i).

[524] *See* proposed 8 CI212.22(c).

[525] *See* 8 CFR 103.3(a)(1)(i). *See* also USCIS Policy Manual Vol. 7 Part A Ch. 11, *https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-11.*

[526] *See* USCIS Policy Manual, Volume 1—General Policies and Procedures, Part E—Adjudications, Chapter 6, Evidence and Chapter 9, Rendering a Decision. *See also* 8 CFR 103.2(b)(8) and (16)(iv).

[527] *See* 84 FR 41292, 41501 (Aug. 14, 2019).

received by certain active-duty military personnel and their spouses and children, benefits received by noncitizens while in a status not subject to the public charge ground of inadmissibility, as well as public benefits received by certain children of U.S. citizens who are expected to obtain U.S. citizenship automatically or shortly after arriving in the United States.[528]

While DHS included the above exclusions from consideration in the 2019 Final Rule, INS did not exclude from consideration the receipt of public benefits by certain populations in the 1999 Interim Field Guidance. Similar to the 1999 Interim Field Guidance, DHS proposes to consider current and/or past receipt of public cash assistance for income maintenance and long-term institutionalization at government expense. DHS makes clear in the proposed regulatory text that DHS would consider the amount, duration, and recency of receipt, and that the current and/or past receipt of these public benefits is not alone sufficient for determining whether an individual is inadmissible because DHS would also consider the minimum statutory factors in each case before making a determination under the totality of the circumstances.[529] DHS is proposing to exclude from consideration public benefits received in two circumstances, as discussed below, and believes that it is unnecessary to further expand the list of exclusions.

Exclusions previously adopted by DHS are not necessary in this proposed rule because this proposed rule's provisions do not unduly interfere with the receipt of public benefits by the populations that were covered by exclusions under the 2019 Final Rule. DHS therefore believes it need not exclude from consideration, for example, the receipt of public benefits for active-duty U.S. service members and their spouses and children, as it did in the 2019 Final Rule, because that exclusion resulted in significant part from the inclusion of SNAP[530] in the definition of public benefits. DHS is proposing to exclude SNAP receipt from consideration altogether in this proposed rule. Similarly, the exclusions from consideration in the 2019 Final Rule applicable to children and pregnant women resulted from that rule's inclusion of most forms of Medicaid,[531] which DHS is proposing in this rule to consider only in the context of long-term institutionalization at government expense. DHS also does not believe that it is necessary to exclude from consideration the receipt of public benefits by certain children of U.S. citizens expected to naturalize automatically or shortly after coming to the United States. In DHS's view, the scope of this rule and the fact that DHS would consider in the totality of the circumstances the amount, length of time, and recency of a noncitizen's receipt of these benefits, makes it unlikely that the receipt of such benefits by such children would carry much weight in public charge inadmissibility determinations.

a. Receipt of Public Benefits While a Noncitizen Is in a Category Exempt From Public Charge

Under PRWORA, many noncitizens, whether present in the United States in a lawful immigration status or not, are not eligible to receive many types of public benefits.[532] Those that are eligible for Federal, State, Tribal, territorial or local benefits include lawful permanent residents, refugees, and asylees who are not subject to a public charge inadmissibility determination.[533] Although many noncitizens who are eligible for Federal, State, Tribal, territorial, or local benefits receive those benefits while present in an immigration classification or category that is exempt from the public charge ground of inadmissibility or after the noncitizen obtained a waiver of the public charge ground of inadmissibility, such noncitizens may later apply for an immigration benefit that subjects them to the public charge ground of inadmissibility. For example, a noncitizen admitted as a refugee may have received benefits on that basis but may later apply for adjustment of status based on marriage to a U.S. citizen and will be subject to the public charge ground of inadmissibility.

The 1999 Interim Field Guidance did not expressly address how to treat an applicant's receipt of public benefits while present in an immigration category that is exempt from the public charge ground of inadmissibility or for which the noncitizen received a waiver of the public charge ground of inadmissibility. The 2019 Final Rule, however, excluded from consideration the receipt of those public benefits from consideration in public charge inadmissibility determinations.[534]

Congress, not DHS, has specified which categories of noncitizens are subject to or are exempt from the public charge ground of inadmissibility. Congress did not exempt from the public charge ground of inadmissibility noncitizens who are applying for admission or adjustment in a category subject to the public charge ground but who, in the past, were in a category of noncitizen exempt from the ground. However, DHS has the authority, in promulgating the public charge inadmissibility framework, to determine which public benefits should be considered as part of a public charge inadmissibility determination.[535]

A review of the categories of noncitizens that are exempt from the public charge ground of inadmissibility or eligible for waivers provides an indication of the concerns that Congress had when establishing these exemptions and waivers. The categories comprise a long list of vulnerable populations or groups of noncitizens of particular policy significance for the United States.[536] Congress expressed a policy preference that individuals in these categories should be able to receive public benefits without risking adverse immigration consequences. DHS believes that Congress did not intend to later penalize such noncitizens for using benefits while in these categories because doing so would undermine the intent of their exemption. Given the nature of these populations and the fact that if they were applying for admission or, as permitted, adjustment of status under those categories they would be exempt from the public charge ground of inadmissibility, it is reasonable for DHS to exclude from consideration those benefits that an applicant received

[528] *Ibid.*

[529] *See* proposed 8 CFR 212.21(a), 212.21(a)(3).

[530] *See* U.S. Gov't Accountability Office, GAO–16–561, Military Personnel: DOD Needs More Complete Data on Active-Duty Servicemembers' Use of Food Assistance Programs (July 2016), *available at https://www.gao.gov/assets/680/678474.pdf* (reporting estimates ranging from 2,000 active duty servicemembers receiving SNAP to 22,000 such servicemembers receiving SNAP). Effective FY16, Congress implemented a recommendation by the Military Compensation and Retirement Modernization Commission to sunset DOD's Family Subsistence Supplemental Allowance Program within the United States, Puerto Rico, the U.S. Virgin Islands, and Guam; SNAP reliance may have increased somewhat following termination of the program. *See* Public Law 114–92, div. A, sec. 602, 129 Stat. 726, 836 (2015); Military Comp. & Ret. Modernization Comm'n, Final Report 187 (Jan. 2015) (''The [Family Subsistence Supplemental Allowance Program] should be sunset in the United States, Puerto Rico, Guam, and other U.S. territories where SNAP or similar programs exist, thereby reducing the administrative costs of a duplicative program.'').

[531] *See, e.g.,* 84 FR 41379–80 (Aug. 14, 2019) (discussing the exclusion of individuals under 21 and pregnant women).

[532] *See* 8 U.S.C. 1611, 1621, and 1641.

[533] *See* 8 U.S.C. 1641.

[534] *See* 84 FR 41292, 41501 (Aug. 14, 2019).

[535] *See* INA sec. 103, 8 U.S.C. 1103.

[536] For example, refugees, asylees, Afghans and Iraqis employed by the U.S. government, special immigrant juveniles, Temporary Protected Status recipients, and trafficking and crime victims.

while in a status that is exempt from the public charge ground of inadmissibility.

Therefore, DHS proposes that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in proposed 8 CFR 212.23(a), or for which the noncitizen received a waiver of public charge inadmissibility, as set forth in proposed 8 CFR 212.23(c).[537] However, under this proposed rule, any benefits received prior to or subsequent to the noncitizen being in an exempt status would be considered in a public charge inadmissibility determination.

b. Receipt of Public Benefits by Those Granted Refugee Benefits

As explained below, under the INA, refugees at the time of admission [538] and adjustment of status [539] and asylees at the time of being granted asylum [540] and adjustment of status [541] are exempt from the public charge ground of inadmissibility. Consistent with the statute, the 1999 Interim Field Guidance,[542] 1999 NPRM,[543] and 2019 Final Rule [544] all included express provisions explaining that these categories are exempt from the public charge ground of inadmissibility, and DHS is proposing to include similar provisions in this rule.[545] As explained above, DHS will not consider any public benefits received by noncitizens while they are in a category exempt from the public charge ground of inadmissibility, including refugees and asylees, when making public charge inadmissibility determinations.

Afghans that have been recently resettled in the United States pursuant to Operation Allies Welcome (OAW) [546] are not refugees admitted under section 207 of the INA, 8 U.S.C. 1157. However, such Afghans are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an ''unaccompanied alien child'' as defined under 6 U.S.C. 279(g)(2).[547] Similarly, noncitizens who are the victims of a severe form of trafficking in persons as defined in 22 U.S.C. 7105(b)(1)(C) and noncitizens classified as nonimmigrants under section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii), are eligible for benefits and services under any Federal or State program or activity funded or administered by certain officials or agencies [548] to the same extent as noncitizens admitted to the United States as refugees under section 207 of the INA, 8 U.S.C. 1157.[549]

Under this proposed rule, when making public charge inadmissibility determinations DHS will not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an ''unaccompanied alien child'' as defined under 6 U.S.C. 279(g)(2).[550] This provision would only apply to those categories of noncitizens who are eligible for all three of the types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees.

DHS does not want to discourage any such noncitizens eligible for resettlement assistance and other benefits available to refugees from accessing services for which they are eligible. The U.S. government has resettled and continues to resettle our Afghan allies. This is a population invited by the government to come to the United States at the government's expense in recognition of their assistance over the past two decades or their unique vulnerability were they to remain in Afghanistan.[551] In recognition of the unique needs of this population and the manner of their arrival in the United States, Congress explicitly extended benefits normally reserved for refugees to our Afghan allies. DHS serves as the lead for coordinating the ongoing efforts, across the Federal Government, to support vulnerable Afghans under OAW. As such, DHS has been actively communicating and promoting the various benefits that this vulnerable population may be eligible for depending on their admission, status in the United States, or both, including SSI, TANF, and various other public benefits.

Similarly, the U.S. government has expressed its strong concern for the victims of severe forms of trafficking in persons and a dedication to stabilizing them. The Trafficking Victims Protection Act of 2000 (TVPA), part of the Victims of Trafficking and Violence Protection Act of 2000, was enacted to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute trafficking in persons, while offering protections to victims of such trafficking, including temporary protections from removal, access to certain federal and state public benefits and services, and the ability to apply for T nonimmigrant status. With the passage of the TVPA, Congress intended to protect victims of trafficking and to take steps to try to meet victim's needs regarding health care, housing, education, and legal assistance.[552]

DHS strongly encourages these populations to access any and all services and benefits available to them without fear of a future negative impact. Thus, DHS now proposes to exempt from consideration receipt of public benefits by those granted refugee benefits by Congress, even when those individuals are not refugees admitted under section 207 of the INA, 8 U.S.C. 1157, such as the Afghans that have been recently resettled in the United States pursuant to OAW and noncitizen victims of a severe form of trafficking in persons.

E. Exemptions and Waivers

The public charge inadmissibility ground does not apply to certain exempted applicants for admission and adjustment of status.[553] Congress has specifically exempted certain groups from the public charge inadmissibility ground, and DHS regulations permit

[537] *See* proposed 8 CFR 212.22(a) and (c).

[538] INA sec. 207, 8 U.S.C. 1157.

[539] INA sec. 209, 8 U.S.C. 1159.

[540] INA sec. 208, 8 U.S.C. 1158.

[541] INA sec. 209, 8 U.S.C. 1159.

[542] 64 FR 28689, 28691 (May 26, 1999).

[543] 64 FR 28676, 28683 (May 26, 1999).

[544] 84 FR 41292, 41504 (Aug. 14, 2019).

[545] *See* proposed 8 CFR 212.23(a)(1) and (2).

[546] On August 29, 2021, President Biden directed DHS to lead implementation of ongoing efforts across the Federal Government to support vulnerable Afghans, including those that worked alongside the U.S. Government in Afghanistan for the past two decades, as they safely resettled in the United States. These coordinated efforts were initially referred to as Operation Allies Refuge, and the operation has since been renamed Operation Allies Welcome. *See* DHS, Operation Allies Welcome, *https://www.dhs.gov/allieswelcome* (accessed Dec. 14, 2021).

[547] *See* section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act, Public Law 117–43 (Sept. 30, 2021).

[548] These are the Secretary of Health and Human Services, the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and the heads of other Federal agencies. *See* 22 U.S.C. 7105(b)(1)(B).

[549] *See* 22 U.S.C. 7105(b)(1)(A).

[550] *See* proposed 8 CFR 212.22(e).

[551] DHS, *Operation Allies Welcome* (2021) *https://www.dhs.gov/sites/default/files/publications/21_1110-opa-dhs-resettlement-of-at-risk-afghans.pdf* (accessed Jan. 12, 2022).

[552] *See* Sec. 102(b), Victims of Trafficking and Violence Protection Act of 2000, Public Law 106–386.

[553] *See* proposed 8 CFR 212.23(a).

waivers of the inadmissibility ground for certain other groups.

In the 1999 NPRM, INS provided a list of categories of noncitizens exempt from the public charge of inadmissibility.[554] The 1999 NPRM also included a section discussing the available waivers.[555] Similarly, in the 2019 Final Rule, DHS provided a list of the categories of noncitizens to whom the public charge ground of inadmissibility does not apply.[556] Likewise, the 2019 Final Rule also contained provisions relating to the available waivers.[557]

Although these exemptions and waivers are addressed in the statute and in some existing regulations, DHS believes it appropriate to include a list of exemptions and waivers to better ensure that the regulated public understands which applicants for admission and adjustment of status are either exempt from the public charge ground of inadmissibility or may be eligible for a waiver of the inadmissibility ground. DHS proposes to include a list of the exemptions from and waivers of the public charge ground of inadmissibility.[558]

1. Exemptions

DHS proposes to include the following list of exemptions from the public charge ground of inadmissibility in this rule, as it did in the 2019 Final Rule (that is no longer in effect), with two additional exemptions pertaining to certain Syrian nationals adjusting status under Public Law 106–378 [559] as well as applicants for adjustment of status under Liberian Refugee Immigration Fairness (LRIF).[560]

• Refugees at the time of admission pursuant to section 207 of the INA, 8 U.S.C. 1157, and asylees at the time of a grant of asylum under section 208 of the INA, 8 U.S.C. 1158, as well as refugees and asylees at the time of adjustment of status to lawful permanent resident;

• Amerasian immigrants at admission, pursuant to in section 584(a)(2) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183 (Dec. 22, 1987) (as amended), 8 U.S.C. 1101 note 5;

• Afghan and Iraqi Interpreters, or Afghan or Iraqi nationals employed by or on behalf of the U.S. Government, pursuant to section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), section 602(b) of the Afghan Allies Protection Act of 2009, as amended, Public Law 111–8 (Mar. 11, 2009), and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Public Law 110–181 (Jan. 28, 2008);

• Cuban and Haitian entrants at adjustment of status, pursuant to section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Jan. 3, 1986) (as amended), 8 U.S.C. 1255a, note;[561]

• Aliens applying for adjustment of status, pursuant to the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966) as amended; 8 U.S.C. 1255, note;

• Nicaraguans and other Central Americans who are adjusting status to lawful permanent resident, pursuant to section 202(a) and section 203 of NACARA, Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997) (as amended), 8 U.S.C. 1255 note;

• Haitians who are adjusting status to lawful permanent resident, pursuant to section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255 note;

• Lautenberg parolees, pursuant to section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255 note;

• Special immigrant juveniles, pursuant to section 245(h) of the INA, 8 U.S.C. 1255(h);

• Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the INA, 8 U.S.C. 1259, and 8 CFR part 249;

• Aliens applying for Temporary Protected Status, pursuant to section 244(c)(2)(ii) of the INA, 8 U.S.C. 1254a(c)(2)(ii) and 8 CFR 244.3(a);[562]

• Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the INA, 8 U.S.C. 1101(a)(15)(A)(i) and (ii) (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), pursuant to section 102 of the INA, 8 U.S.C. 1102, 22 CFR 41.21(d);

• Nonimmigrants classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), pursuant to 22 CFR 41.21(d);

• Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the INA (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories),[563] 8 U.S.C. 1101(a)(15)(G)(i), (ii), (iii), and (iv), pursuant to section 102 of the INA, 8 U.S.C. 1102, 22 CFR 41.21(d);

• Nonimmigrants classifiable as a NATO (North Atlantic Treaty Organization) representative and related categories,[564] pursuant to 22 CFR 41.21(d);

• Individuals who have a pending application that sets forth a prima facie

[554] *See* 64 FR 28676, 28683 (May 26, 1999).

[555] *See* 64 FR 28676, 28684 (May 26, 1999).

[556] See 84 FR 41292, 41504–41505 (Aug. 14, 2019).

[557] *See* 84 FR 41292, 41505 (Aug. 14, 2019).

[558] *See* proposed 8 CFR 212.23. This section includes two provisions that also account for any additional exemptions established by law or waivers established by law or regulation. *See* proposed 8 CFR 212.23(a)(29) and (c)(3).

[559] Adjustment of Status of Certain Syrian Nationals, Public Law 106–378, 114 Stat. 1442 (Oct. 27, 2000).

[560] DHS is adding LRIF to the list of exemptions as Congress established LRIF after the publication of the 2019 Final Rule. In the 2019 Final Rule, DHS inadvertently omitted the former exemption for certain Syrian nationals adjusting status.

[561] *See Matter of Mesa,* 12 I&N Dec. 432, 437 (Dep. Act. Comm'r. 1967).

[562] INA sec. 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii), authorizes DHS to waive any INA sec. 212(a), 8 U.S.C. 1182(a) ground, except for those that Congress specifically noted could not be waived.

[563] Includes the following categories: G–1—Principal Resident Representative of Recognized Foreign Government to International Organization, Staff, or Immediate Family; G–2—Other Representative of Recognized Foreign Member Government to International Organization, or Immediate Family; G–3—Representative of Non-recognized or Nonmember Foreign Government to International Organization, or Immediate Family; G–4—International Organization Officer or Employee, or Immediate Family; G–5—Attendant, Servant, or Personal Employee of G–1 through G–4, or Immediate Family.

[564] Includes the following categories: NATO 1—Principal Permanent Representative of Member State to NATO (including any of its Subsidiary Bodies) Resident in the U.S. and Resident Members of Official Staff; Secretary General, Assistant Secretaries General, and Executive Secretary of NATO; Other Permanent NATO Officials of Similar Rank, or Immediate Family; NATO 2—Other Representative of Member State to NATO (including any of its Subsidiary Bodies) including Representatives, Advisers, and Technical Experts of Delegations, or Immediate Family; Dependents of Member of a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement or in Accordance with the provisions of the ''Protocol on the Status of International Military Headquarters''; Members of Such a Force if Issued Visas; NATO 3—Official Clerical Staff Accompanying Representative of Member State to NATO (including any of its Subsidiary Bodies), or Immediate Family; NATO–4—Official of NATO (Other Than Those Classifiable as NATO–1), or Immediate Family; NATO–5—Experts, Other Than NATO Officials Classifiable Under NATO–4, Employed in Missions on Behalf of NATO, and their Dependents; NATO 6—Member of a Civilian Component Accompanying a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement; Member of a Civilian Component Attached to or Employed by an Allied Headquarters Under the ''Protocol on the Status of International Military Headquarters'' Set Up Pursuant to the North Atlantic Treaty; and their Dependents; NATO–7—Attendant, Servant, or Personal Employee of NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, and NATO–6 Classes, or Immediate Family.

case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the INA (Victim of Severe Form of Trafficking), 8 U.S.C. 1101(a)(15)(T), pursuant to section 212(d)(13)(A) of the INA, 8 U.S.C. 1182(d)(13)(A), or who are in valid T nonimmigrant status and are seeking an immigration benefit for which admissibility is required;

• Petitioners for, or individuals who are granted, nonimmigrant status under section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U) (Victim of Criminal Activity), pursuant to section 212(a)(4)(E)(ii) of the INA, 8 U.S.C. 1182(a)(4)(E)(ii);

• Nonimmigrants who were admitted under section 101(a)(15)(U) (Victim of Criminal Activity) of the INA, 8 U.S.C. 1101(a)(15)(U), at the time of their adjustment of status under section 245(m) of the INA, 8 U.S.C. 1155(m), and 8 CFR 245.24;

• Aliens who are VAWA self-petitioners as defined in section 101(a)(51) of the INA, 8 U.S.C. 1101, pursuant to section 212(a)(4)(E)(i) of the INA, 8 U.S.C. 1182(a)(4)(E)(i);

• ''Qualified aliens'' described in section 431(c) of PRWORA (8 U.S.C. 1641(c)) (certain battered aliens as ''qualified aliens''), pursuant to section 212(a)(4)(E)(iii) of the INA, 8 U.S.C. 1182(a)(4)(E)(iii);

• Applicants adjusting status under section National Defense Authorization Act For Fiscal Year 2004 (NDAA 2004), Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003) (posthumous benefits to surviving spouses, children, and parents);

• Noncitizen American Indians Born in Canada, pursuant to section 289 of the INA, 8 U.S.C. 1359

• Noncitizen members of the Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma pursuant to Public Law 97–429 (Jan. 8, 1983);

• Nationals of Vietnam, Cambodia, and Laos adjusting status, pursuant to section 586 of Public Law 106–429 (Nov. 1, 2000);

• Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989, to December 31, 1991, under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note;

• Certain Syrian nationals adjusting status under Public Law 106–378;

• Applicants adjusting under the Liberian Refugee Immigration Fairness (LRIF) law, pursuant to section 7611 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Public Law 116–92, 113 Stat. 1198, 2309 (Dec. 20, 2019); and

• Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

In general, the aforementioned classes of noncitizens are vulnerable populations of immigrants and nonimmigrants. Some have been persecuted or victimized and others have little to no private support network in the United States. These individuals tend to require government protection and support for a period of time. Admission of these noncitizens also serves distinct public policy goals separate from the general immigration system. The source of each exemption mentioned in proposed 8 CFR 212.23(a) can be found elsewhere in U.S. law.

2. Limited Exemption

Noncitizens described in proposed 8 CFR 212.23(a)(18) through (21) [565] are exempt from the public charge ground of inadmissibility.[566] Congress, however, did not include paragraph (D) of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4)(D), among the exemptions in paragraph (E) for these categories. Paragraph (E) requires that an applicant for admission or adjustment of status in the employment-based preference categories of section 203(b) of the INA, 8 U.S.C. 1153(b), based on a petition filed by a relative of such an applicant (or by an entity in which the relative has a significant ownership interest) submit an Affidavit of Support Under Section 213A of the INA. DHS lacks the authority to expand the exemptions listed in section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E), to include paragraph (D).[567] Therefore, in certain circumstances these categories of individuals must submit an Affidavit of Support Under Section 213A of the INA if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D).

DHS proposes to codify this limited exemption in proposed 8 CFR 212.23(b).

3. Waivers

The proposed regulation at 8 CFR 212.23(c) lists the categories of applicants Congress has authorized to apply for waivers of the public charge inadmissibility ground, as follows:

• S (alien witness or informant) nonimmigrants described in section 101(a)(15)(S) of the INA, 8 U.S.C. 1101(a)(15)(S);

• Applicants for admission and adjustment of status under section 245(j) of the INA, 8 U.S.C. 1255(j) (alien witness or informant); and

• Other waivers of the public charge inadmissibility provisions in section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), permissible under the law.[568]

F. Public Charge Bonds

As detailed in the background section, DHS has existing regulations implementing its discretionary authority to accept public charge bonds under section 213 of the INA, 8 U.S.C. 1183. These bond provisions, found at 8 CFR 213.1 and 8 CFR 103.6, regulate the admission, upon giving a bond, of individuals found inadmissible to the United States under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), including how such bonds are posted and cancelled.

After the 2019 Final Rule, which included more detailed public charge bond provisions,[569] was vacated, DHS sought public comments in the ANPRM addressing public charge bonds and received a number of thoughtful suggestions. After careful consideration of those comments, DHS is not proposing changes to the existing regulatory provisions at this time. This approach is consistent with the approach DHS has taken historically when implementing the public charge ground of inadmissibility under the 1999 Interim Field Guidance that is currently in place.[570] Notwithstanding the approach taken in the 2019 Final Rule, at this time, the existing regulations provide an adequate framework for DHS to exercise its discretion with respect to public charge bonds, particularly given the relatively small number of cases where USCIS may be inclined to offer a public charge bond in its discretion.

[565] This includes individuals seeking adjustment of status who are in T nonimmigrant status, U nonimmigrant status, VAWA self-petitioners, and ''qualified aliens'' described in section 431(c) of PRWORA, 8 U.S.C. 1641(c).

[566] Section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E), specifically excludes these categories of noncitizens from sections 212(a)(4)(A), (B), and (C) of the INA, 8 U.S.C. 1882(a)(4)(A), (B), and (C).

[567] *See, e.g., Lamie* v. *U.S. Tr.,* 540 U.S. 526, 538 (2004) and *Yith* v. *Nielsen,* 881 F.3d 1155, 1164 (9th Cir. 2018).

[568] *See, e.g.,* INA 212(d)(3), 8 U.S.C. 1182(d)(3) (broadly authorizing waivers of various grounds of inadmissibility for noncitizens applying for a nonimmigrant visa or admission as a nonimmigrant).

[569] *See* 84 FR 41292, 41505–41507 (Aug. 14, 2019).

[570] *See* 64 FR 28689, 28693 (May 26, 1999). *See* 64 FR 28676, 28684 (May 26, 1999).

VI. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, to the extent permitted by law, to proceed only if the benefits justify the costs. They also direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In particular, E.O. 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and human dignity.

The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has determined that this proposed rule is an economically ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866. Accordingly, OMB has reviewed this regulation.

1. Summary of the Proposed Rule

The proposed rule describes how DHS will determine whether a noncitizen is inadmissible because they are likely at any time to become a public charge, *i.e.,* likely to become primarily dependent on the government for subsistence. The proposed rule also clarifies the types of public benefits that are considered in public charge inadmissibility determinations. DHS proposes to limit such consideration to public cash assistance for income maintenance and long-term institutionalization at government expense.[571] [572] Public cash assistance for income maintenance would include cash assistance provided under TANF, SSI, and general assistance. This is the same list of public benefits that are considered under the 1999 Interim Field Guidance that was the operative standard for nearly 20 years until the 2019 Final Rule (that is no longer in effect) was promulgated. DHS also proposes to define key terms and to codify a list of categories of noncitizens who are statutorily exempt from the public charge ground of inadmissibility, or eligible for a waiver.

The proposed rule uses a framework similar to the one set forth in the 1999 Interim Field Guidance, under which officers consider past or current receipt of certain public benefits, as well as the statutory minimum factors (the noncitizen's age, health, family status, assets, resources, and financial status, and education and skills) and the Affidavit of Support Under Section 213A of the INA, where required, as part of a totality of the circumstances framework. The proposed rule maintains the language set forth in the 1999 Interim Field Guidance that reiterated more specifically the general requirement that every written denial decision issued by USCIS based on the public charge ground of inadmissibility include a discussion of each of the statutory factors.

The proposed rule establishes two exclusions from consideration of public benefits received by certain noncitizens. First, the proposed rule clarifies that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. Second, under the proposed rule, when making a public charge inadmissibility determination, DHS will also not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an ''unaccompanied alien child'' as defined under 6 U.S.C. 279(g)(2). This provision would only apply to those categories of noncitizens who are eligible for all three of the types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees.

2. Summary of the Costs and Benefits of the Proposed Rule

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of the proposed rule, DHS considers the potential impacts of this proposed rule relative to two baselines, as well the potential impact of a regulatory alternative. The No Action Baseline represents a state of the world under the 1999 Interim Field Guidance, which is the policy currently in effect. The second baseline is the Pre-Guidance Baseline, which represents a trajectory established before the issuance of the 1999 Interim Field Guidance (*i.e.,* a state of the world in which the 1999 Interim Field Guidance did not exist). The alternative analysis presented below relates to an alternative consistent with the 2019 Final Rule.

Relative to the No Action Baseline, the primary source of quantified new direct costs for the proposed rule is the increase in the time required to complete Form I–485. DHS estimates that the proposed rule would impose additional new direct costs of approximately $12,871,511 annually to applicants filing Form I–485. In addition, the proposed rule results in an annual savings for a subpopulation of affected individuals; T nonimmigrants applying for adjustment of status will no longer need to submit Form I–601 to seek a waiver of the public charge ground of inadmissibility. DHS estimates the total annual savings for this population will be $15,359. DHS estimates that the total annual net costs will be $12,856,152.[573]

Over the first 10 years of implementation, DHS estimates the total net costs of the proposed rule would be approximately $128,561,520 (undiscounted). In addition, DHS estimates that the 10-year discounted total net costs of this proposed rule would be about $109,665,584 at a 3-percent discount rate and about $90,296,232 at a 7-percent discount rate.

DHS expects the primary benefit of this proposed rule to be the non-quantified benefit of establishing clear standards governing a determination that a noncitizen is inadmissible based on the public charge ground.

The following two tables provide a more detailed summary of the proposed provisions and their impacts relative to the No Action Baseline and Pre-Guidance Baseline, respectively.

BILLING CODE 9111–97–P

[571] See proposed 8 CFR 212.21(a).

[572] As noted in the public benefits section above, DHS proposes to replace the term ''institutionalization for long-term care at government expense'' with ''long-term institutionalization,'' which better describes the specific types of services covered and the duration for receiving them. The terms are not meant to be substantively different.

[573] Calculations: Total annual net costs ($12,856,152) = Total annual costs ($12,871,511) − Total annual savings ($15,359).

Table 11. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the No Action Baseline)

Provision	Purpose	Expected Impact of Proposed Rule
Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among affected population by providing clarity on inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	

Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. **Transfer Payments**: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.

Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

Table 12. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the Pre-Guidance Baseline)

Provision	Purpose	Expected Impact of Proposed Rule
Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	

Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. **Transfer Payments**: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.

<table>
<tr>
<td>Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.</td>
<td>Outlines exemptions and waivers for inadmissibility based on the public charge ground.</td>
<td>Qualitative:
<u>Benefits</u>
• The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.
<u>Costs</u>
• None
Transfer Payments:
• The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking.
• The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.</td>
</tr>
<tr>
<td colspan="3">Source: USCIS analysis.</td>
</tr>
</table>

In addition to the impacts summarized above, and as required by OMB Circular A–4, the following two tables present the prepared accounting statement showing the costs associated with this proposed rule.[574]

Table 13. OMB A-4 Accounting Statement ($ in millions, 2021; No Action Baseline, FY 2022 – FY 2032)

Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation
BENEFITS				
Monetized Benefits	N/A			RIA
Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.			RIA
COSTS				
Annualized monetized net	(3%) $12.9	N/A	N/A	RIA

[574] *See* OMB. "Circular A–4." September 17, 2003. Available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

costs (discount rate in parenthesis)	(7%) $12.9	N/A	N/A	
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	Costs to various entities and individuals associated with regulatory familiarization with the provisions of the proposed rule. Costs will include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. DHS estimates that the opportunity cost of time will range from about $118.65 to $158.20 per individual who will read and review the proposed rule. However, DHS cannot determine the number of individuals who will read the proposed rule.			RIA
TRANSFERS Relative to the No Action Baseline, the proposed rule could lead to an increase in public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.				
Annualized monetized transfers: "on budget"	N/A	N/A	N/A	RIA
From whom to whom?				RIA
Annualized monetized transfers: "off-budget"	N/A	N/A	N/A	
From whom to whom?				
Miscellaneous Analyses/Category	***Effects***			***Source Citation***
Effects on State, local, and/or Tribal governments	None			None
Effects on small businesses	None			RIA
Effects on wages	None			None
Effects on growth	None			None

Table 14. OMB A-4 Accounting Statement ($ in millions, 2021; Pre-Guidance Baseline, FY2022-FY2032)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Monetized Benefits	N/A			RIA
Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.			RIA
COSTS				
Annualized monetized costs (discount rate in parenthesis)	(3%) $ 12.9	N/A	N/A	RIA
	(7%) $ 12.9	N/A	N/A	
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	Costs to various entities and individuals associated with regulatory familiarization with the provisions of the proposed rule. Costs will include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. DHS estimates that the opportunity cost of time will range from about $118.65 to $158.20 per individual who will read and review the proposed rule. However, DHS cannot determine the number of individuals who will read the proposed rule.			RIA
TRANSFERS The proposed rule could lead to an increase in public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event. The primary impact of the				

proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer payments from the Federal and State governments to individuals. DHS also believes that the rule may have indirect effects on businesses in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs. However, DHS is unable to quantify these effects.				
Annualized monetized transfers: "on budget"	N/A	N/A	N/A	RIA
From whom to whom?				RIA
Annualized monetized transfers: "off-budget"	N/A	N/A	N/A	
From whom to whom?				
Miscellaneous Analyses/Category	***Effects***			***Source Citation***
Effects on State, local, and/or Tribal governments	DHS believes that the rule may have indirect effects on State, local, and/or Tribal government, but DHS does not know the full extent of the effect on State, local, and/or Tribal governments as compared to the Pre-Guidance Baseline. There may be costs to various entities associated with familiarization of and compliance with the provisions of the rule, including salaries and opportunity costs of time to monitor and understand regulation requirements, disseminate information, and develop or modify information technology (IT) systems as needed. It may be necessary for many government agencies to update guidance documents, forms, and web pages. It may be necessary to prepare training materials and retrain staff at each level of government, which will require additional staff time and will generate associated costs. However, DHS is unable to quantify these effects.			RIA
Effects on small businesses	DHS believes that the rule may have indirect effects on small businesses and nonprofits in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits. However, DHS is unable to quantify these effects.			RIA
Effects on wages	None			None
Effects on growth	None			None

3. Background and Purpose of the Rule

As discussed in the preamble, DHS seeks to administer the public charge ground of inadmissibility in a manner that will be clear and comprehensible and will lead to fair and consistent adjudications. Under the INA, a noncitizen who, at the time of application for a visa, admission, or adjustment of status, is deemed likely at any time to become a public charge is ineligible for a visa, inadmissible, or ineligible for adjustment of status.[575]

While the INA does not define public charge, Congress has specified that, when determining if a noncitizen is likely at any time to become a public charge, immigration officers must, at a minimum, consider certain factors, including the noncitizen's age; health; and family status; assets, resources, and financial status; and education and skills.[576] Additionally, DHS may consider any affidavit of support

[575] *See* INA sec. 212(a)(4); 8 U.S.C. 1182(a)(4).

[576] *See* INA sec. 212(a)(4)(B)(i); 8 U.S.C. 1182(a)(4)(B)(i).

submitted under section 213A of the Act, 8 U.S.C. 1183a, on behalf of the applicant when determining whether the applicant may become a public charge.[577] For most family-based and some employment-based immigrant visas or adjustment of status applications, applicants must have a sufficient affidavit of support or they will be found inadmissible as likely to become a public charge.[578]

The estimation of costs and benefits for this proposed rule focuses on individuals applying for adjustment of status with USCIS using Form I–485. Such individuals would be applying from within the United States, rather than applying for a visa from outside the United States at a DOS consulate abroad. Moreover, DHS notes that CBP may incur costs pursuant to this proposed rule, but we are unable to determine this potential cost at this time due to data limitations. For example, CBP employees would have to spend time examining noncitizens arriving at a port of entry seeking admission, either pursuant to a previously issued visa or as a traveler for whom visa requirements have been waived and determining if they are likely to become a public charge if they are admitted. However, DHS is not able to quantify the number of noncitizens who would possibly be deemed inadmissible at a port of entry based on a public charge determination pursuant to this proposed rule. DHS is qualitatively acknowledging this potential impact.

4. Population

This proposed rule would affect individuals who are present in the United States who are seeking adjustment of status to that of a lawful permanent resident. By statute, an individual who is seeking adjustment of status and is at any time likely to become a public charge is ineligible for such adjustment, unless the individual is exempt from or has received a waiver of the public charge ground of inadmissibility.[579] The grounds of inadmissibility set forth in section 212 of the INA, 8 U.S.C. 1182, also apply when certain noncitizens seek admission to the United States, whether for a temporary purpose or permanently. However, the public charge inadmissibility ground (including ineligibility for adjustment of status) does not apply to all applicants since there are various categories of applicants that Congress expressly exempted from the public charge inadmissibility ground. Within USCIS, this proposed rule would affect individuals who apply for adjustment of status because these individuals would be required to be reviewed for a determination of inadmissibility based on public charge grounds as long as the individual is not in a category of applicant that is exempt from the public charge ground of inadmissibility. DHS notes that the population estimates are based on noncitizens present in the United States who are applying for adjustment of status and does not include individuals seeking admission at a port of entry due to the data limitations. These limitations could result in underestimation of the cost, benefit, or transfer payments of the proposed rule. However, DHS is unable to quantify the magnitude.

a. Population Seeking Adjustment of Status

The population affected by this rule consists of individuals who are applying for adjustment of status using Form I–485. Under the proposed rule, a subset of these individuals (*i.e.,* those who are not exempt from the public charge ground of inadmissibility) would undergo review for determination of inadmissibility based on public charge grounds, unless an individual is in a category of applicant that is exempt from the public charge ground of inadmissibility. The following table shows the total number of Form I–485 applications received for FY 2014 to FY 2021. DHS selects the period FY 2014–FY 2018 to project the number of applications to be filed for the next 10 years for the reasons discussed below. Between FY 2014 and FY 2018, the population of individuals applying for adjustment of status ranged from a low of 637,138 in FY 2014 to a high of 763,192 in FY 2017. In addition, the average population of individuals who applied for adjustment of status over this period was 690,837.

Table 15. Total Population that Applied for Adjustment of Status, FY 2014 to FY 2021.

Fiscal Year	Total Population Applying for Adjustment of Status
2014	637,138
2015	638,018
2016	711,431
2017	763,192
2018	704,407
2019	600,079
2020	577,920
2021	726,566
Total (FY 2014 – FY 2018)	**3,454,186**
5-year average (FY 2014 – FY 2018)	**690,837**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)

[577] *See* INA sec. 212(a)(4)(B)(ii). When required, the applicant must submit Form I–864, Affidavit of Support Under Section 213A of the INA.

[578] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

[579] *See* INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

For this analysis, DHS projects the affected population for the 10-year period from the beginning of FY 2022. DHS bases its population projection on the historical number of Form I–485 applications received over the period FY 2014–FY 2018.[580]

i. Exemptions From Determination of Inadmissibility Based on Public Charge Ground

There are exemptions and waivers for certain categories of noncitizens that are not subject to a determination of inadmissibility based on the public charge ground. The following table shows the classes of applicants for admission, adjustment of status, or registry according to statute or regulation that are exempt from inadmissibility based on the public charge ground.

[580] USCIS excluded data from FY 2019–FY 2021 due to data anomalies. As shown in the table, the population of adjustment of status applicants in FY 2019 and FY 2020 decreased significantly, followed by an increase beginning at the end of FY 2020 and beginning of FY 2021. By far the most significant increase in FY 2021 occurred in October 2020, during which receipts reached 184,779, as compared to 86,911 in October 2019, and 55,483 in October 2018. The level of receipts in October 2020 was substantially higher than the level of receipts for any other month since FY 2014. Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

Table 16. Categories of Applicants for Admission, Adjustment of Status, or Registry Exempt from Inadmissibility Based on Public Charge According to Statute or Regulation.	
• Refugees and asylees as follows: at the time admission under section 207 of the Act (refugees) or grant under section 208 of the Act (asylees); for both refugees and asylees, at the time of adjustment of status to lawful permanent resident under sections 207(c)(3) and 209(c) of the Act;	• Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202, 101 Stat. 1329-183, sec. 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note 5;
• Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Pub. L. 109–163 (Jan. 6, 2006), as amended, section 602(b) of the Afghan Allies Protection Act of 2009, Pub. L. 111–8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Pub. L. 110-181 (Jan. 28, 2008);	• Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;
• Aliens applying for adjustment of status under the Cuban Adjustment Act, Pub. L. 89-732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;	• Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of NACARA, Pub. L. 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;
• Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;	• Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;
• Special immigrant juveniles as described in section 245(h) of the Act;	• Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the INA, 8

	U.S.C. 1259, and 8 CFR part 249 (Registry);
• Aliens applying for or reregistering for Temporary Protected Status, pursuant to section 244(c)(2)(ii) of the INA, 8 U.S.C. 1254a(c)(2)(ii) and 8 CFR 244.3(a)	• Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983)
• Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the INA, 8 U.S.C. 1101(a)(15)(A)(i) and (ii) (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), pursuant to section 102 of the INA, 8 U.S.C. 1102, and 22 CFR 41.21(d)	• Nonimmigrants classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), pursuant to 22 CFR 41.21(d)
• Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the INA (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), 8 U.S.C. 1101(a)(15)(G)(i), (ii), (iii), and (iv), pursuant to section 102 of the INA, 8 U.S.C. 1102, and 22 CFR 41.21(d)	• Nonimmigrants classifiable as a NATO representatives and related categories, pursuant to 22 CFR 41.21(d)
• Individuals with a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the INA (Victim of Severe Form of Trafficking), 8 U.S.C. 1101(a)(15)(T), pursuant to section 212(d)(13)(A) of the INA, 8 U.S.C. 1182(d)(13)(A), as well as individuals in T nonimmigrant status who are seeking an immigration benefit for which inadmissibility is required	• Petitioners for, or individuals who are granted, nonimmigrant status under section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U) (Victim of Criminal Activity), pursuant to section 212(a)(4)(E)(ii) of the INA, 8 U.S.C. 1182(a)(4)(E)(ii), who are seeking an immigration benefit for which inadmissibility is required
• Certain Syrian nationals adjusting status under Public Law 106-378	• Applicants adjusting status who qualify for a benefit under Liberian Refugee Immigration Fairness, pursuant to Section 7611 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. 116-92, 113 Stat. 1198, 2309 (Dec. 20, 2019), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116-260 (December

	27, 2020) (Adjustment of Status for Liberian Nationals Extension)
• Noncitizens who are VAWA self-petitioners as defined in section 101(a)(51) of the INA, 8 U.S.C. 1101, pursuant to section 212(a)(4)(E)(i) of the INA, 8 U.S.C. 1182(a)(4)(E)(i)	• A "qualified alien" described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), in accordance with section 212(a)(4)(E)(iii) of the Act;
• Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Pub. L. 108-136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents)	• American Indians Born in Canada as described in section 289 of the INA, 8 U.S.C. 1359;
• Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Pub. L. 106-429 under 8 CFR 245.21	• Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989, to December 31, 1991, under section 646(b) of IIRIRA, Pub. L. 104-208, div. C, title VI, subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note
• Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).	
Source: USCIS.	

To estimate the annual total population of individuals seeking to adjust status who would be subject to review for inadmissibility based on the public charge ground, DHS examined the annual total population of individuals who applied for adjustment of status for FY 2014–FY 2018. As noted above, the most recent fiscal years, FY 2019–FY 2021, are not considered for this analysis because they may be outlier years.

For each fiscal year, DHS removed individuals from the population whose category of applicants is exempt from review for inadmissibility on the public charge ground, as shown in Table 17 below, leaving the total population that would be subject to such review. Further discussion of these exempt categories can be found in the preamble.

Table 17 shows the total estimated population of individuals seeking to adjust status under a category of applicant that is exempt from review for inadmissibility on the public charge ground for FY 2014–FY 2018 as well as the total estimated population that would be subject to public charge review.[581] In FY 2018, for example, the total number of persons who applied for adjustment of status across various classes of admission was 704,407. After removing individuals from this population whose category of applicant is exempt from review for inadmissibility on the public charge ground, DHS estimates the total population of adjustment of status applicants in FY 2018 who would be subject to review for inadmissibility on the public charge ground is 524,228.[582]

[581] Calculation of total estimated population that would be subject to public charge review: (Total Population Applying for Adjustment of Status)—(Total Population Seeking Adjustment of Status that is Exempt from Public Charge Review for Inadmissibility) = Total Population Subject to Public Charge Review for Inadmissibility.

[582] Calculation of total population subject to public charge review for inadmissibility for fiscal year 2018: 704,407—180,179 = 524,228.

Table 17. Total Estimated Population of Individuals Seeking Adjustment of Status Who Were Exempt from or Subject to Public Charge Inadmissibility.

Fiscal Year	Total Population Applying for Adjustment of Status	Total Population Seeking Adjustment of Status that is Exempt from Review for Inadmissibility on the Public Charge Ground	Total Population Subject to Review for Inadmissibility on the Public Charge Ground
2014	637,138	178,007	459,131
2015	638,018	170,681	467,337
2016	711,431	196,090	515,341
2017	763,192	221,629	541,563
2018	704,407	180,179	524,228
Total	**3,454,186**	**946,586**	**2,507,600**
5-year average	**690,837**	**189,317**	**501,520**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

DHS estimates the projected annual average total population of adjustment of status applicants that would be subject to review for inadmissibility on the public charge ground is 501,520. This estimate is based on the 5-year average of the annual estimated total population subject to review for inadmissibility on the public charge ground from FY 2014–FY 2018. Over this 5-year period, the estimated population of individuals who applied for adjustment of status subject to review for inadmissibility on the public charge ground ranged from a low of 459,131 in FY 2014 to a high of 541,563 in FY 2017. DHS notes that the population estimates are based on noncitizens present in the United States who are applying for adjustment of status, rather than noncitizens who apply for an immigrant visa through consular processing at a DOS consulate or embassy abroad.

ii. Requirement To Submit an Affidavit of Support Under Section 213A of the INA

Certain noncitizens seeking immigrant visas or adjustment of status are required to submit an Affidavit of Support Under Section 213A of the INA executed by a sponsor on their behalf. This requirement applies to most family-sponsored immigrants and some employment-based immigrants.[583] Even within the family-sponsored and employment-based classes of admission, some noncitizens are not required to submit an Affidavit of Support Under Section 213A executed by a sponsor on their behalf. A failure to meet the requirement for a sufficient Affidavit of Support Under Section 213A of the INA will result in the noncitizen being found inadmissible under the public charge ground of inadmissibility without review of the statutory minimum factors discussed above.[584] When a sponsor executes an Affidavit of Support Under Section 213A of the INA on behalf of an applicant, they establish a legally enforceable contract between the sponsor and the U.S. Government with an obligation to financially support the applicant and reimburse benefit granting agencies if the sponsored immigrant receives certain benefits during the period of enforceability.[585]

Table 18 shows the estimated total population of individuals seeking adjustment of status who were required or not required to have a sponsor execute an Affidavit of Support Under Section 213A of the INA on their behalf over the period FY 2014—FY 2018. The estimated annual average population of individuals seeking to adjust status who were required to have a sponsor submit an affidavit of support on their behalf over the 5-year period was 297,998. Over this 5-year period, the estimated total population of individuals required to submit an affidavit of support from a sponsor ranged from a low of 268,091 in FY 2014 to a high of 329,011 in FY 2017.

[583] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

[584] *See* INA sec. 212(a)(4)(C) and (D), 213A(a), 8 U.S.C. 1182(a)(4)(C) and (D), 1183a(a).

[585] *See* INA sec. 213A(a) and (b), 8 U.S.C. 1183a(a) and (b).

Table 18. Total Estimated Population of Individuals Seeking Adjustment of Status Who Are Required or Not Required to Submit an Affidavit of Support.

Fiscal Year	Total Population Not Required to Submit Affidavit of Support	Total Population Required to Submit Affidavit of Support
2014	369,047	268,091
2015	365,066	272,952
2016	391,035	320,396
2017	434,181	329,011
2018	404,865	299,542
Total	**1,964,194**	**1,489,992**
5-year average	**392,839**	**297,998**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)

5. Cost-Benefit Analysis

DHS expects this proposed rule to produce costs and benefits associated with the procedures for administering the public charge ground of inadmissibility. For this proposed rule, DHS generally uses the effective minimum wage plus weighted average benefits of $17.11 per hour ($11.80 effective minimum wage base plus $5.31 weighted average benefits) as a reasonable proxy of the opportunity cost of time for individuals who are applying for adjustment of status.[586] DHS also uses $17.11 per hour to estimate the opportunity cost of time for individuals who cannot or choose not to participate in the labor market as these individuals incur opportunity costs, assign valuation in deciding how to allocate their time, or both. This analysis uses the effective minimum wage rate since approximately 80 percent of the total number of individuals who applied for lawful permanent resident status were in a category of applicant under the family-sponsored categories (including immediate relatives of U.S. citizens) and other non-employment-based classifications such as diversity, refugees and asylees, and parolees.[587] Even when an individual is not working for wages, their time has value. For example, if someone performs childcare, housework, or other activities without paid compensation, that time still has value. Due to the wide variety of non-paid activities an individual could pursue, it is difficult to estimate the value of that time. DHS requests public comment on ways to best estimate the value of this non-paid time. DHS assumes the effective minimum wage for this non-paid time. DHS requests comments on using effective minimum wage.

The effective minimum wage of $11.80 is an unweighted hourly wage that does not account for worker benefits. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent Department of Labor, Bureau of Labor Statistics (BLS) report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45, which incorporates employee wages and salaries and the full cost of benefits, such as paid leave, insurance, and retirement.[588] DHS notes that there is no requirement that an individual be employed in order to file Form I–485 and many applicants may not be employed. Therefore, in this proposed rule, DHS calculates the total rate of compensation for individuals applying for adjustment of status as $17.11 per hour in this proposed rule using the benefits-to-wage multiplier, where the mean hourly wage is $11.80 per hour worked and average benefits are $5.31 per hour.[589]

a. Establishing the Baselines

DHS discusses the potential impacts of this proposed rule relative to two baselines. The first baseline is a No Action Baseline that represents a state of the world in which DHS is implementing the public charge ground of inadmissibility consistent with the 1999 Interim Field Guidance.

The second baseline is a Pre-Guidance Baseline, which represents a state of the world in which the 1999 NPRM,[590] 1999 Interim Field Guidance,[591] and the 2019 Final Rule were not enacted.

DHS requests comment on whether the No Action and 1999 Interim Field Guidance baselines capture the range of reasonably likely futures in the absence of this proposed rule (including directions and magnitudes of impacts associated with changes in sub-regulatory guidance) or if the range should be broadened or narrowed. Relatedly, feedback is welcome regarding the extent to which the 2019 Final Rule (presented below as a regulatory alternative) affected the

[586] *See* ''Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)'' Emie Tedschi, The New York Times, April 24, 2019. Accessed at *https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html* (accessed Jan. 10, 2022).

[587] USCIS analysis of data provided by USCIS, Policy and Research Division (Dec. 2021).

[588] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $39.55/$27.35 = 1.446 = 1.45(rounded). *See* Economic News Release, *Employer Cost for Employee Compensation (September 2021),* U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. *available at https://www.bls.gov/news.release/pdf/ecec.pdf* (viewed Jan. 6, 2022).

[589] The calculation of the weighted Federal minimum hourly wage for applicants: $11.80 per hour * 1.45 benefits-to-wage multiplier = $17.11(rounded) per hour.

[590] *See* ''Inadmissibility and Deportability on Public Charge Grounds,'' Proposed Rule,'' 64 FR 28676 (May 26, 1999).

[591] *See* ''Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,'' 64 FR 28689 (May 26, 1999). Due to a printing error, the **Federal Register** version of the Field Guidance is dated ''March 26, 1999,'' even though the guidance was signed May 20, 1999, became effective May 21, 1999, and was published in the **Federal Register** on May 26, 1999.

baseline and thus should be incorporated into this portion of the analysis, rather than in the assessment of alternative options.

b. No Action Baseline

The No Action Baseline represents the current state of the world in which DHS applies the public charge ground of inadmissibility consistent with the 1999 Interim Field Guidance. For this proposed rule, DHS estimates the No Action Baseline according to current operations and requirements and compares the estimated costs and benefits of the provisions set forth in this proposed rule to this baseline. DHS notes that costs detailed as part of the No Action Baseline include all current costs associated with completing and filing Form I–485, including required biometrics collection and medical examination (Form I–693), as well as any affidavits of support (Forms I–864, I–864A, I–864EZ, and I–864W) or requested fee waivers (Form I–912).

As noted previously in this analysis, DHS estimates the projected average annual total population of adjustment of status applicants that would be subject to review for inadmissibility on the public charge ground is 501,520. This estimate is based on the 5-year average of the annual estimated total population subject to review for inadmissibility on the public charge ground from FY 2014–FY 2018. Table 19 shows the estimated population and annual costs of filing for adjustment of status for the proposed rule. These costs primarily result from the process of applying for adjustment of status, including filing Form I–485 and Form I–693 as well as filing an affidavit of support or Form I–912 or both, if necessary.

Table 19. Total Average Annual No Action Baseline (Current) Costs.

Form	Estimated Average Annual Population	Total Annual Cost
I-485, Application to Register Permanent Residence or Adjust Status	**501,520**	**$715,613,873**
Filing Fee		$571,732,800
Opportunity Cost of Time (OCT)		$55,091,972
Biometrics Services Fee		$42,629,200
Biometrics Services OCT		$31,490,441
Biometrics Services Travel Costs		$14,669,460
I-693, Report of Medical Examination and Vaccination Record	**501,520**	**$269,080,526**
Medical Exam Cost		$247,625,500
Opportunity Cost of Time (OCT)		$21,455,026
I-912, Request for Fee Waiver	**69,194**	**$1,385,264**
Opportunity Cost of Time (OCT)		$1,385,264
Affidavit of Support Forms (I-864, I-864A, I-864EZ, I-864W)	**297,998**	**$70,714,925**
Opportunity Cost of Time (OCT)		$70,714,925
Total Annual No Action Baseline Costs		**$1,056,794,588**
Source: USCIS analysis.		

BILLING CODE 9111–97–C

i. Forms Relevant to This Proposed Rule

Form I–485, Application To Register Permanent Residence or Adjust Status

The basis of the quantitative costs estimated for this proposed rule is the cost of filing for adjustment of status using Form I–485, the opportunity cost of time for completing this form, any other required forms, and the cost for any other incidental costs (*e.g.,* travel costs) an individual must bear that are required in the filing process. DHS reiterates that costs examined in this section are not additional costs that the proposed rule would impose; rather, they are costs that applicants incur as part of the current application process to adjust status. The current filing fee for Form I–485 is $1,140. The fee is set at a level to recover the processing costs to DHS. As previously discussed in the population section, the estimated average annual population of individuals who apply for adjustment of status using Form I–485 is 501,520. Therefore, DHS estimates that the annual filing fee costs associated for Form I–485 is approximately $571,732,800.[592]

DHS estimates the time burden of completing Form I–485 is 6.42 hours per response, including the time for reviewing instructions, gathering the

[592] Calculation: Form I–485 filing fee ($1,140) * Estimated annual population filing Form I–485 (501,520) = $571,732,800 annual cost for filing Form I–485.

required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[593] Using the total rate of compensation for minimum wage of $17.11 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I–485 would be $109.85 per applicant.[594] Therefore, using the total population estimate of 501,520 annual filings for Form I–485, DHS estimates the total opportunity cost of time associated with completing Form I–485 is approximately $55,091,972 annually.[595]

USCIS requires applicants who file Form I–485 to submit biometric information (fingerprints and signature) by attending a biometrics services appointment at a designated USCIS Application Support Center (ASC). The biometrics services processing fee is $85.00 per applicant. Therefore, DHS estimates that the annual cost associated with biometrics services processing for the estimated average annual population of 501,520 individuals applying for adjustment of status is approximately $42,629,200.[596]

In addition to the biometrics services fee, the applicant would incur the costs to comply with the biometrics submission requirement as well as the opportunity cost of time for traveling to an ASC, the mileage cost of traveling to an ASC, and the opportunity cost of time for submitting their biometrics. While travel times and distances vary, DHS estimates that an applicant's average roundtrip distance to an ASC is 50 miles and takes 2.5 hours on average to complete the trip.[597] Furthermore, DHS estimates that an applicant waits an average of 1.17 hours for service and to have their biometrics collected at an ASC,[598] adding up to a total biometrics-related time burden of 3.67 hours. Using the total rate of compensation of the effective minimum wage of $17.11 per hour, DHS estimates the opportunity cost of time for completing the biometrics collection requirements for Form I–485 is $62.79 per applicant.[599] Therefore, using the total population estimate of 501,520 annual filings for Form I–485, DHS estimates the total opportunity cost of time associated with completing the biometrics collection requirements for Form I–485 is approximately $31,490,441 annually.[600]

In addition to the opportunity cost of providing biometrics, applicants would incur travel costs related to biometrics collection. The cost of travel related to biometrics collection would equal $29.25 per trip, based on the estimated average 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of $0.585 per mile.[601] DHS assumes that each applicant would travel independently to an ASC to submit their biometrics, meaning that this rule would impose a travel cost on each of these applicants. Therefore, DHS estimates that the total annual cost associated with travel related to biometrics collection for the estimated average annual population of 501,520 individuals applying for adjustment of status is approximately $14,669,460.[602]

In sum, DHS estimates the total current annual cost for filing Form I–485 is $715,613,873, which includes Form I–485 filing fees, biometrics services fees, opportunity cost of time for completing Form I–485 and submitting biometrics information, and travel cost associated with biometrics collection.[603] DHS notes that a medical examination is generally required as part of the application process to adjust status. Costs associated with the medical examination are detailed in the next section. Moreover, costs associated with submitting an affidavit of support and requesting a fee waiver are also detailed in subsequent sections since such costs are not required for every individual applying for an adjustment of status.

Form I–693, Report of Medical Examination and Vaccination Record

USCIS requires most applicants who file Form I–485 seeking adjustment of status to submit Form I–693 as completed by a USCIS-designated civil surgeon. Form I–693 is used to report results of an immigration medical examination to USCIS. For this analysis, DHS assumes that all individuals who apply for adjustment of status using Form I–485 will also submit Form I–693. DHS reiterates that costs examined in this section are not additional costs that the proposed rule would impose, but costs that applicants currently incur as part of the application process to adjust status. Form I–693 is required for adjustment of status applicants to establish that they are not inadmissible to the United States on health-related grounds. While there is no filing fee associated with Form I–693, the applicant is responsible for paying all costs of the immigration medical examination, including the cost of any follow-up tests or treatment that is required, and must make payments directly to the civil surgeon or other health care provider. In addition, applicants bear the opportunity cost of time for completing the applicant portions of Form I–693, as well as sitting for the immigration medical exam and the time waiting to be examined.

USCIS does not regulate the fees charged by civil surgeons for the completion of an immigration medical examination. In addition, immigration medical examination fees vary widely by civil surgeon, from as little as $20 to as much as $1,000 per applicant (including vaccinations, additional medical evaluations, and testing that may be required based on the medical conditions of the applicant).[604] DHS

[593] USCIS. ''Instructions for Application to Register Permanent Residence or Adjust Status (Form I–485).'' OMB No. 1615–0023. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf* (Accessed 1/12/2022).

[594] Calculation for opportunity cost of time for filing Form I–485: ($17.11 per hour * 6.42 hours) = $109.85 (rounded) per applicant.

[595] Calculation: Form I–485 estimated opportunity cost of time ($109.85) * Estimated annual population filing Form I–485 (501,520) = $55,091,972 (rounded) annual opportunity cost of time for filing Form I–485.

[596] Calculation: Biometrics services processing fee ($85) * Estimated annual population filing Form I–485 (501,520) = $42,629,200 annual cost for associated with Form I–485 biometrics services processing.

[597] *See* Employment Authorization for Certain H–4 Dependent Spouses, Final Rule, 80 FR 10284 (Feb. 25, 2015); and Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule, 78 FR 536, 572 (Jan. 3, 2013).

[598] Source for biometric time burden estimate: USCIS. ''Instructions for Application to Register Permanent Residence or Adjust Status (Form I–485).'' OMB No. 1615–0023. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf* (accessed Jan. 12, 2022).

[599] Calculation for opportunity cost of time to comply with biometrics submission for Form I–485: ($17.11 per hour * 3.67 hours) = $62.79 (rounded) per applicant.

[600] Calculation: Estimated opportunity cost of time to comply with biometrics submission for Form I–485 ($62.79) * Estimated annual population filing Form I–485 (501,520) = $31,490,441 (rounded) annual opportunity cost of time for filing Form I–485.

[601] *See* U.S. General Services Administration website for Privately Owned Vehicle (POV) Mileage Reimbursement Rates, *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates-etc/privately-owned-vehicle-pov-mileage-reimbursement-rates* (accessed Jan. 7, 2022).

[602] Calculation: (Biometrics collection travel costs) * (Estimated annual population filing Form I–485) = $29.25 * 501,520= $14,669,460 annual travel costs related to biometrics collection for Form I–485.

[603] Calculation: $571,732,800 (Annual filing fees for Form I–485) + $55,091,972 (Opportunity cost of time for filing Form I–485) + $42,629,200 (Biometrics services fees) + $31,490,441 (Opportunity cost of time for biometrics collection requirements) + $14,669,460 (Travel costs for biometrics collection) = $715,613,873 total current annual cost for filing Form I–485.

[604] Source for immigration medical examination cost range: Paperwork Reduction Act (PRA) Report

estimates that the average cost for these activities is $493.75 and that all applicants would incur this cost.[605] Since DHS assumes that all applicants who apply for adjustment of status using Form I–485 must also submit Form I–693, DHS estimates that based on the estimated average annual population of 501,520 the annual cost associated with filing Form I–693 is $247,625,500.[606]

DHS estimates the time burden associated with filing Form I–693 is 2.5 hours per applicant, which includes understanding and completing the form, setting an appointment with a civil surgeon for a medical exam, sitting for the medical exam, learning about and understanding the results of medical tests, allowing the civil surgeon to report the results of the medical exam on the form, and submitting the medical exam report to USCIS.[607] DHS estimates the opportunity cost of time for completing and submitting Form I–693 is $42.78 per applicant based on the total rate of compensation of minimum wage of $17.11 per hour.[608] Therefore, using the total population estimate of 501,520 annual filings for Form I–485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I–693 is approximately $21,455,026 annually.[609]

In sum, DHS estimates the total current annual cost for filing Form I–693 is $260,805,446, including medical exam costs, the opportunity cost of time for completing Form I–693, and cost of postage to mail the Form I–693 package to USCIS.[610]

Form I–912, Request for Fee Waiver

Some applicants seeking an adjustment of status may be eligible for a fee waiver when filing Form I–485. An applicant who is unable to pay the filing fees or biometric services fees for an application or petition may be eligible for a fee waiver by filing Form I–912. If an applicant's Form I–912 is approved, USCIS, as a component of DHS, will waive both the filing fee and biometric services fee. Therefore, DHS assumes for the purposes of this economic analysis that the filing fees and biometric services fees required for Form I–485 are waived if an approved Form I–912 accompanies the application. Filing Form I–912 is not required for applications and petitions that do not have a filing fee. DHS also notes that costs examined in this section are not additional costs that would be imposed by the proposed rule but costs that applicants currently could incur as part of the application process to adjust status.

Table 20 shows the estimated population of individuals that requested a fee waiver (Form I–912), based on receipts, when applying for adjustment of status in FY 2014–FY 2018, as well as the number of requests that were approved or denied each fiscal year. During this period, the number of individuals who requested a fee waiver when applying for adjustment of status ranged from a low of 49,292 in FY 2014 to a high of 95,476 in FY 2017. In addition, the estimated average population of individuals applying to adjust status who requested a fee waiver for Form I–485 over the 5-year period FY 2014–FY 2018 was 69,194. DHS estimates that 69,194 is the average annual projected population of individuals who would request a fee waiver using Form I–912 when filing Form I–485 to apply for an adjustment of status.[611]

of Medical Examination and Vaccination Record (Form I–693) (OMB control number 1615–0033). The PRA Supporting Statement can be found at Question 13 on *Reginfo.gov* at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004.*

[605] Source for immigration medical examination cost estimate: Paperwork Reduction Act (PRA) Report of Medical Examination and Vaccination Record (Form I–693) (OMB control number 1615–0033). The PRA Supporting Statement can be found at Question 13 on *Reginfo.gov* at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004.*

[606] Calculation: (Estimated immigration medical examination cost for Form I–693) * (Estimated annual population filing Form I–485) = $493.75 * 501,520 = $247,625,500 annual estimated medical exam costs for Form I–693.

[607] Source for immigration medical examination time burden estimate: USCIS. ''Instructions for Report of Medical Examination and Vaccination Record (Form I–693).'' OMB No. 1615–0033. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-693instr.pdf* (accessed Jan. 13, 2022).

[608] Calculation for immigration medical examination opportunity cost of time: ($17.11 per hour * 2.5 hours) = $42.78 per applicant.

[609] Calculation: (Estimated immigration medical examination opportunity cost of time for Form I–693) * (Estimated annual population filing Form I–485) = $42.78 * 501,520 = $21,455,026 (rounded) annual opportunity cost of time for filing Form I–485.

[610] Calculation: $247,625,500 (Medical exam costs) + $21,455,026 (Opportunity cost of time for Form I–693) = $269,080,526 total current annual cost for filing Form I–693.

[611] DHS notes that the estimated population of individuals who would request a fee waiver for filing Form I–485 includes all visa classifications for those applying for adjustment of status. We are unable to determine the number of fee waiver requests for filing Form I–485 that are associated with specific visa classifications that are subject to public charge review.

Table 20. Total Population Requesting A Fee Waiver (Form I-912) when Filing Form I-485, Adjustment of Status.

Fiscal Year	Receipts	Approvals	Denials
2014	49,292	47,535	1,546
2015	52,815	50,927	1,556
2016	87,377	81,946	4,156
2017	95,476	88,486	4,704
2018	61,010	54,496	3,425
Total	**345,970**	**323,390**	**15,387**
5-yr average	**69,194**	**64,678**	**3,077**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

Note: The number of requests adjudicated in a fiscal year will not be equal to the number of received requests. A request received in one fiscal year may not be adjudicated until a subsequent fiscal year.

To provide a reasonable proxy of time valuation for applicants, as described previously, DHS assumes that applicants requesting a fee waiver for Form I–485 earn the total rate of compensation for individuals applying for adjustment of status as $17.11 per hour, where the value of $10.51 per hour represents the effective minimum wage with an upward adjustment for benefits.

DHS estimates the time burden associated with filing Form I–912 is 1 hour and 10 minutes per applicant (1.17 hours), including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.[612] Therefore, using $17.11 per hour as the total rate of compensation, DHS estimates the opportunity cost of time for completing and submitting Form I–912 is $20.02 per applicant.[613] Using the total population estimate of 69,194 requests for a fee waiver for Form I–485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I–912 is approximately $1,385,264 annually.[614]

Form I–864, Affidavit of Support Under Section 213A of the INA, and Related Forms

As previously discussed, submitting a Form I–864 is required for most family-based immigrants and some employment-based immigrants to show that they have adequate means of financial support and are not likely to become a public charge. Additionally, Form I–864 can include Form I–864A, which may be filed when a sponsor's income and assets do not meet the income requirements of Form I–864 and the qualifying household member chooses to combine their resources with the sponsor's income, assets, or both to meet those requirements. Some sponsors for applicants filing applications for adjustment of status may be able to execute Form I–864EZ rather than Form I–864, provided certain criteria are met. Moreover, certain classes of immigrants currently are exempt from the requirement to file Form I–864 or Form I–864EZ and therefore must file Form I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support.

There is no filing fee associated with filing Form I–864 with USCIS. However, DHS estimates the time burden associated with a sponsor executing Form I–864 is 6 hours per adjustment applicant, including the time for reviewing instructions, gathering the required documentation and information, completing the affidavit, preparing statements, attaching necessary documentation, and submitting the Form I–864.[615]

To estimate the opportunity cost of time associated with filings of I–864, this analysis uses $39.55 per hour, the total compensation amount including costs for wages and salaries and benefits from the BLS report on Employer Costs for Employee Compensation detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries.[616] DHS uses this wage rate because DHS expects that sponsors who file affidavits of support have adequate means of financial support and are likely to be employed.

Using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I–864 would be $237.30 per petitioner.[617] DHS assumes that the average rate of total compensation used to calculate the

612 Source for fee waiver time burden estimate: USCIS. ''Instructions for Fee Waiver Request (Form I–912).'' OMB No. 1615–0116. Expires Sept. 30, 2024. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf* (accessed Jan. 13, 2022).

613 Calculation for fee waiver opportunity cost of time: ($17.11 per hour * 1.17 hours) = $20.02 (rounded).

614 Calculation: (Estimated opportunity cost of time for Form I–912) * (Estimated annual population of approved Form I–912) = $20.02 * 69,194= $1,385,264 (rounded) annual opportunity cost of time for filing Form I–912 that are approved.

615 Source for Form I–864 time burden estimate: USCIS. ''Instructions for Affidavit of Support Under Section 213A of the INA (Form I–864).'' OMB No. 1615–0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864instr.pdf* (accessed Jan. 13, 2022).

616 *See* Economic News Release, *Employer Cost for Employee Compensation (September 2021),* U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. *Available at https://www.bls.gov/news.release/archives/ecec_12162021.pdf* (last modified Dec. 17, 2021).

617 Calculation opportunity cost of time for completing and submitting Form I–864, Affidavit of Support Under Section 213A of the INA: ($39.55 per hour * 6.0 hours) = $237.30 per applicant.

opportunity cost of time for Form I–864 is appropriate since the sponsor of an immigrant, who is agreeing to provide financial and material support, is instructed to complete and submit the form. Using the estimated annual total population of 297,998 individuals seeking to adjust status who are required to submit an affidavit of support using Form I–864, DHS estimates the opportunity cost of time associated with completing and submitting Form I–864 $70,714,925 annually.[618] DHS estimates this amount as the total current annual cost for filing Form I–864, as required when applying to adjust status.

There is also no filing fee associated with filing Form I–864A with USCIS. However, DHS estimates the time burden associated with filing Form I–864A is 1 hour and 45 minutes (1.75 hours) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the contract, preparing statements, attaching necessary documentation, and submitting the contract.[619] Therefore, using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I–864A will be $69.21 per petitioner.[620] DHS assumes the average total rate of compensation used for calculating the opportunity cost of time for Form I–864 since both the sponsor and another household member agree to provide financial support to an immigrant seeking to adjust status. However, the household member also may be the intending immigrant. While Form I–864A must be filed with Form I–864, DHS notes that we are unable to determine the number of filings of Form I–864A since not all individuals filing I–864 need to file Form I–864A with a household member.

As with Form I–864, there is no filing fee associated with filing Form I–864EZ with USCIS. However, DHS estimates the time burden associated with filing Form I–864EZ is 2 hours and 30 minutes (2.5 hours) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the affidavit, preparing statements, attaching necessary documentation, and submitting the affidavit.[621] Therefore, using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I–864EZ will be $98.88 per petitioner.[622] However, DHS notes that we are unable to determine the number of filings of Form I–864EZ and, therefore, rely on the annual cost estimate developed for Form I–864.

There is also no filing fee associated with filing Form I–864W with USCIS. However, DHS estimates the time burden associated with filing this form is 60 minutes (1 hour) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.[623] Therefore, using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I–864EZ will be $39.55 per petitioner.[624] However, DHS notes that we are unable to determine the number of filings of Form I–864W and, therefore, rely on the annual cost estimate developed for Form I–864.

ii. Costs of Proposed Regulatory Changes

In this section, DHS estimates costs of the proposed rule relative to No Action Baseline. The primary source of quantified new costs for the proposed rule would be from an additional 1.5 hours increase in the time burden estimate to complete Form I–485 for applicants who are subject to the public charge ground of inadmissibility.[625] The additional time burden is required to collect information based on factors such as age; health; family status; assets, resources, and financial status; and education and skills, so that USCIS could determine whether an applicant would be inadmissible to the United States based on the public charge ground.

The proposed rule would include additional instructions as well as additional questions for filing Form I–485 for applicants who are subject to the public charge ground of inadmissibility and, as a result, those applicants would spend additional time reading the instructions increasing the estimated time to complete the form. The current estimated time to complete Form I–485 is 6 hours and 25 minutes (6.42 hours). For the proposed rule, DHS estimates that the time burden for completing Form I–485 would increase by 1.5 hours. Therefore, in the proposed rule, the time burden to complete Form I–485 would be 7 hours and 55 minutes (7.92 hours).

The following cost is a new cost that would be imposed on the population applying to adjust status using Form I–485 for applicants who are subject to the public charge ground of inadmissibility. Table 21 shows the estimated new annual costs that the proposed rule would impose on individuals seeking to adjust status using Form I–485 for applicants who are subject to the public charge ground of inadmissibility with a 1.5-hour increase in the time burden estimate for completing Form I–485.

[618] Calculation: (Form I–864 estimated opportunity cost of time) * (Estimated annual population filing Form I–864) = $237.30 * 297,998 = $70,714,925 (rounded) total annual opportunity cost of time for filing Form I–864.

[619] Source for I–864A time burden estimate: USCIS. ''Instructions for Contract Between Sponsor and Household Member (Form I–864A).'' OMB No. 1615–0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864ainstr.pdf* (accessed Jan. 13, 2022).

[620] Calculation opportunity cost of time for completing and submitting Form I–864A, Contract Between Sponsor and Household Member: ($39.55 per hour * 1.75 hours) = $69.21 (rounded) per petitioner.

[621] Source for I–864EZ time burden estimate: USCIS. ''Instructions for Affidavit of Support Under Section 213A of the INA (Form I–864EZ).'' OMB No. 1615–0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864ezinstr.pdf* (accessed Jan. 13, 2022).

[622] Calculation opportunity cost of time for completing and submitting Form I–864EZ, Affidavit of Support Under Section 213A of the INA: ($39.55 per hour * 2.5 hours) = $98.88 (rounded).

[623] Source for I–864W time burden estimate: USCIS. ''Instructions for Request for Exemption for Intending Immigrant's Affidavit of Support (Form I–864W).'' OMB No. 1615–0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf* (accessed Jan. 13, 2022).

[624] Calculation opportunity cost of time for completing and submitting Form I–864W: ($39.55 per hour * 1.0 hours) = $39.55.

[625] To be clear, these form changes will not affect applicants who are exempt from the public charge ground of inadmissibility listed in proposed 8 CFR 212.23.

Table 21. Total New Quantified Direct Costs of the Proposed Rule.

Form	Estimated Annual Population	Total Annual Cost
Form I-485, Application to Register Permanent Residence or Adjust Status	**501,520**	
Opportunity Cost of Time – Additional to No Action Baseline (Current) Costs		$12,871,511
Total New Quantified Costs of the Proposed Rule		**$12,871,511**
Source: USCIS analysis.		

The time burden includes the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[626] Using the total rate of compensation for minimum wage of $17.11 per hour, DHS currently estimates the opportunity cost of time for completing and filing Form I–485 would be $25.67 per applicant.[627] Therefore, using the total population estimate of 501,520 annual filings for Form I–485 for applicants who are subject to the public charge ground of inadmissibility, DHS estimates the current total opportunity cost of time associated with completing Form I–485 is approximately $12,871,511 annually.[628]

iii. Cost Savings of the Proposed Regulatory Changes

DHS anticipates that the proposed rule would produce some quantitative cost savings relative to both baselines. DHS proposes that T nonimmigrants applying for adjustment of status will no longer need to submit Form I–601 seeking a waiver on public charge grounds of inadmissibility. The existing regulations at 8 CFR 212.18 and 8 CFR 245.23 stating that T nonimmigrants are required to obtain waivers are not in line with the Violence Against Women Act Reauthorization Act of 2013 (VAWA 2013).[629] T nonimmigrants are exempt from public charge inadmissibility under the statute, and therefore never should have required a waiver in order to adjust status. The proposed rule would align the regulation with the statute. DHS estimates the cost savings for this population will be $15,359 annually.

Table 22 shows the total population between FY 2014 and FY 2018 that filed form I–601. Over the 5-year period the population of individuals who have applied for adjustment of status ranged from a low of 6 in FY 2018 to a high of 35 in FY 2014. On average, the annual population of individuals over five fiscal years who filed Form I–601 and applied for adjustment of status with a T nonimmigrant status is 16.

Table 22. Total Population who filed Form I-601, Application for Waiver of Grounds of Inadmissibility and Applied for Adjustment of Status with a T Nonimmigrant status, Fiscal Year 2014 to 2018.

Fiscal Year	Total Receipts
2014	35
2015	11
2016	9
2017	19
2018	6
Total	**80**
5-year average	**16**
Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)	

[626] Source: USCIS. ''Instructions for Application to Register Permanent Residence or Adjust Status (Form I–485).'' OMB No. 1615–0023. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf* (accessed Jan. 12, 2022).

[627] Calculation for opportunity cost of time for filing Form I–485: ($17.11 per hour * 1.5 hours) = $25.67 (rounded) per applicant.

[628] Calculation: Form I–485 estimated opportunity cost of time ($17.11 per hour * 1.5 hours) * Estimated annual population filing Form I–485 (501,520) = $17.11 *1.5*501,520=$12,871,511(rounded) annual opportunity cost of time for filing Form I–485.

[629] *See* Public Law 113–4, 127 Stat. 54 (Mar. 7, 2013).

DHS considers the historical data from FY 2014 to FY 2018 as the basis to form an estimated population projection of receipts for Form I–601 for T nonimmigrants who are adjusting status for the 10-year period beginning in FY 2022. Based on the average annual population of I–601 filers between FY 2014 and FY 2018, DHS projects that 16 T nonimmigrants who are applying for adjustment of status will no longer need to file Form I–601. DHS uses the effective minimum wage base plus weighted average benefit of $17.11 per hour to estimate the opportunity cost of time for these individuals since they are not likely to be participating in the labor market. DHS previously estimated the time burden to complete the Form I–601 as 1.75 hours, including the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[630] Thus, DHS estimates the opportunity cost of time for completing Form I–601 to be $479.08.[631] Based on the population estimate and the filing fee of $930 for Form I–601, the total estimated cost for filing fees for the all 16 estimated filers would be approximately $14,880.[632] The sum of the filing fee results in an estimated total annual savings of $15,359 resulting from the proposed rule, including the opportunity cost of time and filing fees.[633]

iv. Familiarization Costs

A likely impact of the proposed rule relative to both baselines is that various individuals and other entities will incur costs associated with familiarization with the provisions of the rule. Familiarization costs involve the time spent reviewing a rule. A noncitizen might review the rule to determine whether they are subject to the proposed rule. To the extent an individual who is directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule.

In addition to those being directly regulated by the rule, a wide variety of other entities would likely choose to read the rule and incur familiarization costs. For example, immigration lawyers, immigration advocacy groups, health care providers of all types, benefits-administering agencies, nonprofit organizations, nongovernmental organizations, and religious organizations, among others, may want to become familiar with the provisions of this proposed rule. DHS believes such nonprofit organizations and other advocacy groups might choose to read the rule to provide information to noncitizens and associated households who may be subject to the rule. Familiarization costs incurred by those not directly regulated are indirect costs. Indirect impacts are borne by entities that are not specifically regulated by this rule but may incur costs due to changes in behavior related to this rule.

DHS estimates the time that would be necessary to read the rule would be approximately 3 to 4 hours per person, resulting in opportunity costs of time. DHS assumes the average professional reads technical documents at a rate of about 250 to 300 words per minute. An entity, such as a nonprofit or advocacy group, may have more than one person who reads the proposed rule. Using the average total rate of compensation as $39.55 per hour for all occupations, DHS estimates that the opportunity cost of time will range from about $118.65 to $158.20 per individual who must read and review the final rule.[634] However, DHS is unable to estimate the number of people that would familiarize themselves with this rule. As such, DHS is unable to quantify this cost. DHS requests comments on other possible indirect impacts of the rule and appropriate methodologies for quantifying these non-monetized potential impacts.

v. Transfer Payments of Proposed Regulatory Changes

DHS also considers transfer payments from the Federal and State governments to certain individuals who receive public benefits that would be more likely to occur under the proposed regulatory changes as compared to the No Action Baseline. While the proposed rule follows closely the approach taken in the 1999 Interim Field Guidance, it contains two changes that may have an effect on transfer payments. First, the proposed rule provides that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. Second, under the proposed rule, when making a public charge inadmissibility determination, DHS will also not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an ''unaccompanied alien child'' as defined under 6 U.S.C. 279(g)(2). Individuals covered by these exclusions may be more likely to participate in public benefit programs for the limited period of time that they are in such status or eligible for such benefits. This clarification could lead to an increase in public benefit participation by certain persons (most of whom would likely not to be subject to the public charge ground of inadmissibility in any event). This change could increase transfer payments from the Federal, Tribal, State, territorial, and local governments to certain individuals. DHS is unable to quantify the effects of these changes but welcomes public comments on the matter.

vi. Benefits of Proposed Regulatory Changes

The primary benefit of the proposed rule would be time savings of individuals directly and indirectly affected by the proposed rule. By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions to apply for adjustment of status or enrolling or

[630] Source: USCIS. ''Instructions for Application for Waiver of Grounds of Inadmissibility (Form I–601).'' OMB No. 1615–0029. Expires July. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf* (accessed Jan. 20, 2022).

[631] Calculation: (Form I–601, time burden) * (Estimated annual applicants for Form I–601) * (Hourly wage) = 1.75 * 16 *$17.11= $479.08 (rounded) per applicant.

[632] Calculation: Filing fee* Estimated annual applicants for Form I–601 = $930*16=$14,880.

[633] Calculation: Total savings ($15,359) =$479.08+$14,880=$15,359 (rounded).

[634] Calculation: (Average total compensation for all occupations) * (Time to read proposed rule—lower bound) = (Opportunity cost of time [OCT] to read proposed rule) = $39.55 * 3 hours = $118.65 OCT per individual to read proposed rule, 3 hours (rounded) = (approximately 60,000 words/300)/60.

Calculation: (Average total compensation for all occupations) * (Time to read proposed rule—upper bound) = (Opportunity cost of time [OCT] to read proposed rule) = $39.55 * 4 hours = $158.20 OCT per individual to read proposed rule, 4 hours= (approximately 60,000 words/250)/60.

Average total compensation for all occupation ($39.55): *See* Economic News Release, *Employer Cost for Employee Compensation (September 2021),* U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. *Available at https://www.bls.gov/news.release/archives/ecec_12162021.pdf* (last modified December 17, 2021).

disenrolling in public benefit programs. For example, when noncitizens make decisions on whether to adjust status or to enroll or disenroll in public benefit programs, they may spend time gathering information or consulting attorneys. The proposed rule would reduce the time spent making these decisions. Specifically, the proposed rule provides clarity on inadmissibility on the public charge ground by codifying certain definitions, standards, and procedures. Listing the categories of noncitizens exempt from the public charge inadmissibility ground adds clarity as to which noncitizens are subject to the public charge determination and will help to reduce uncertainty and confusion. However, DHS is unable to quantify the reduction in time spent gathering information or consulting attorneys. DHS does not have data on how much time individuals would spend in making a decision on whether to adjust status or to enroll or disenroll in public benefit programs. DHS welcomes public comment on this benefit.

vii. Total Estimated and Discounted Costs

To compare costs over time, DHS applied a 3 percent and a 7 percent discount rate to the total estimated costs and savings associated with the proposed rule.[635] Table 23 presents a summary of the total direct costs, savings, and net costs in the proposed rule.

Table 23. Summary of Estimated Total Direct Costs and Cost Savings of the Proposed Rule

	Total Annual Costs/Savings	Costs/Savings over 10-year Period
Annual Costs	$12,871,511	$128,715,110
Annual Cost Savings	$15,359	$153,590
Annual Net Costs[1]	$12,856,152	$128,561,520

Source: USCIS Analysis
[1] Annual Net Costs= Annual Costs – Annual Savings

Over the first 10 years of implementation, DHS estimates the undiscounted direct costs of the proposed rule would be approximately $128,715,110, the cost savings $153,590, and the net costs $128,561,520. In addition, as seen in Table 24, DHS estimates that the 10-year discounted net cost of this proposed rule to individuals applying to adjust status who would be required to undergo review for determination of inadmissibility based on public charge would be approximately $109,665,584 at a 3-percent discount rate and approximately $90,296,232 at a 7-percent discount rate.

Table 24. Discounted Costs

	Costs over 10-year Period	Savings over 10-year Period	Net Costs over 10-year Period
Total Undiscounted Costs/Savings	$128,715,110	$153,590	$128,561,520
Total Costs/Savings at 3% Discount Rate	$109,796,599	$131,015	$109,665,584
Total Costs/Savings at 7% Discount Rate	$90,404,107	$107,875	$90,296,232

Source: USCIS Analysis.

viii. Costs to the Federal Government

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs and services provided without charge to certain applicants and petitioners. *See* section 286(m) of the INA, 8 U.S.C. 1356(m). DHS notes that USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs, such as salaries and benefits for clerical positions, officers, and managerial positions, plus an amount to recover unassigned overhead (*e.g.,* facility rent, IT equipment and systems) and immigration benefits provided without a fee charge. Consequently, since USCIS

[635] *See* OMB. *Circular A–4.* September 17, 2003. Available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

immigration fees are based on resource expenditures related to the service in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. Therefore, DHS has established the fee for the adjudication of Form I–485, Application to Register Permanent Residence or Adjust Status.

DHS notes the time required for USCIS to review the additional information collected in Form I–485 when the proposed rule is finalized includes the additional time to adjudicate the underlying benefit request. DHS notes that the proposed rule may increase USCIS' costs associated with adjudicating immigration benefit requests. DHS estimates that the increased time to adjudicate the benefit request will result in an increased employee cost of approximately $14 million per year.[636] USCIS currently does not charge a filing fee for other forms affected by this proposed rule do not currently charge a filing fee, including Form I–693, Medical Examination and Vaccination Record; Affidavit of Support forms (Form I–864, Form I–864A, Form I–864EZ, and I–864W); Form I–912, Request for Fee Waiver, and Form I–407, Record of Abandonment of Lawful Permanent Resident Status. While filing fees are not charged for these forms, the cost to USCIS is captured in the fee for I–485. Future adjustments to the fee schedule may be necessary to recover the additional operating costs and will be determined at USCIS' next comprehensive biennial fee review.

c. Pre-Guidance Baseline

As noted above, the Pre-Guidance Baseline represents a state of the world in which the 1999 NPRM, 1999 Interim Field Guidance, and the 2019 Final Rule were not enacted. The Pre-Guidance Baseline is included in this analysis in accordance with OMB Circular A–4, which directs agencies to include a pre-statutory baseline in an analysis if substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action.[637] DHS previously has not performed a regulatory analysis on the regulatory costs and benefits of the 1999 Interim Field Guidance and, therefore, includes a Pre-Guidance Baseline in this analysis for clarity and completeness. We present the Pre-Guidance Baseline to provide a more informed picture on the overall impacts of the 1999 Interim Field Guidance since its inception, while recognizing that many of these impacts have been realized already.

The 2022 proposed rule would affect individuals who apply for adjustment of status because these individuals would be subject to inadmissibility determinations based on the public charge ground as long as the individual is not in a category of applicant that is exempt from the public charge ground of inadmissibility. In order to estimate the effect of the proposed rule relative to Pre-Guidance baseline, DHS revisits the state of the world for both the Pre-Guidance baseline and the No Action baseline. The state of the world in the Pre-Guidance baseline is one in which the 1999 Interim Field Guidance was never enacted. The state of the world in the No Action baseline is one in which the 1999 Interim Field Guidance was enacted and has been in practice. In order to estimate the effect of the 2022 proposed rule relative to the Pre-Guidance baseline, DHS considers the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline as well as the changes in this proposed rule relative to the No Action Baseline. Since the latter has already been discussed in the No Action Baseline Section, the rest of this section focuses on estimating the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline.

PRWORA and IIRIRA generated considerable public confusion about noncitizen eligibility for public benefits and the related question of whether the receipt of Federal, State, or local public benefits for which a noncitizen may be eligible renders them likely to become a public charge. According to the literature, these laws led to sharp reductions in the use of public benefit programs by immigrants between 1994 to 1997. This phenomenon is referred to as a chilling effect, which describes immigrants disenrolling from or forgoing enrollment in public benefit programs due to fear or confusion regarding: (1) The immigration consequences of public benefit receipt; or (2) the rules regarding noncitizen eligibility for public benefits.[638 639 640] The state of the world before the 1999 NPRM and 1999 Field Guidance reflected growing public confusion over the meaning of the term ''public charge'' in immigration law, which was undefined, and its relationship to the receipt of Federal, State, or local public benefits.

The U.S. Department of Agriculture (USDA) published a study shortly after PRWORA took effect. The study found that the number of people receiving food stamps fell by over 5.9 million between summer 1994 and summer 1997.[641] The study notes that enrollment in the food stamps program was falling during this period, possibly due to strong economic growth, but the decline in enrollment was steepest among legal immigrants. Under PRWORA, legal immigrants were facing significantly stronger restrictions under which most of them would become ineligible to receive food stamps in September 1997. The study found that enrollment of legal immigrants in the food stamps program fell by 54 percent, accounting for 14 percent of the total decline. USDA also observed that

> Restrictions on participation by legal immigrants ''appear to have deterred participation by their children, many of whom retained their eligibility for food stamps. Participation among U.S. born children living with their legal immigrant parents fell faster than participation among children living with native-born parents. The number of participating children living with legal immigrants fell by 37 percent, versus 15 percent for children living with native-born parents.''[642]

Another study found evidence of a ''chilling effect'' following enactment of PRWORA and IIRIRA where noncitizen enrollment in public benefits programs declined more steeply than U.S. citizen enrollment over the period 1994 through 1997.[643] The study found that

[636] Office of Performance and Quality data received on December 30, 2021. The increase in employee cost is based on estimates of additional adjudication time due to the proposed rule, at compensation rates approximated by General Schedule wage data for USCIS employees.

[637] *See* OMB. *Circular A–4, pp. 15–16.* September 17, 2003. Available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[638] Fix, M.E., & Passel, J.S. (1999). *Trends in noncitizens' and citizens' use of public benefits following welfare reform.* The Urban Institute. *http://webarchive.urban.org/publications/408086.html.*

[639] Bell, S.H. (2001). *Why are welfare caseloads falling?* The Urban Institute. *https://www.urban.org/sites/default/files/publications/61341/310302-Why-Are-Welfare-Caseloads-Falling-.pdf.*

[640] Lofstrom, M., & Bean, F.D. (2002). Assessing immigrant policy options: Labor market conditions and post-reform declines in immigrants' receipt of welfare. *Demography* 39(4), 617–63.

[641] *See* Genser, J. (1999). *Who is leaving the Food Stamps Program: An analysis of Caseload Changes from 1994 to 1997.* Washington, DC: U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis, Nutrition, and Evaluation. Available at *https://www.fns.usda.gov/snap/who-leaving-food-stamp-program-analysis-caseload-changes-1994-1997* (accessed Jan. 27, 2022).

[642] *Id.* at 2–3.

[643] *See* Fix, M.E., and Passel, J.S. (1999). *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994–1997.* Washington, DC: The Urban Institute. Available at *https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform* (accessed Jan. 27, 2022).

''[w]hen viewed against the backdrop of overall declines in welfare receipt for all households, use of public benefits among noncitizen households fell more sharply (35 percent) between 1994 and 1997 than among citizen households (14 percent). These patterns hold for welfare (defined here as TANF, SSI, and General Assistance), food stamps, and Medicaid.'' [644] The study authors concluded that rising incomes did not explain the relatively high disenrollment rate and suggested that the steeper declines in noncitizens' use of benefits was attributable more to the chilling effects of PRWORA and public charge, among other factors. The study authors expected that, over time, eligibility changes would become more important because, under PRWORA, most immigrants admitted after August 22, 1996, would be ineligible for most means-tested public benefits for at least 5 years after their entry to the country.[645]

As described in the 1999 NPRM, the 1999 NPRM sought to reduce the negative public health and nutrition consequences generated by the existing confusion and to provide noncitizens with better guidance as to the types of public benefits that would be considered or not considered in reviews for inadmissibility on the public charge ground.

By providing a clear definition of ''likely at any time to become a public charge'' and identifying the types of public benefits that would be considered in public charge inadmissibility determinations, the proposed rule could alleviate confusion and uncertainty with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits not only causes considerable harm, but also can have a range of downstream consequences for the general public. By describing the kinds of public benefits, if received, that could result in a determination that a person is likely at any time to become a public charge, immigrants would be able to maintain available supplemental benefits that are designed to aid individuals in gaining and maintaining employment. The proposed rule also lists the factors that must be considered in making public charge determinations. The proposed rule makes clear that the past or current receipt of public assistance, by itself, would not lead to a determination of being a public charge without also considering the minimum statutory factors.

The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer payments from the Federal and State governments to individuals. As discussed above, the chilling effect due to PRWORA and IIRIRA resulted in a decline in participation in public benefit programs among noncitizens and foreign-born individuals and their families. The proposed rule would alleviate confusion and uncertainty, as compared to the Pre-Guidance Baseline, by clarifying the ground of public charge inadmissibility. This clarification would lead to an increase in public benefit participation by certain persons (most of whom would likely not be subject to the public charge ground of inadmissibility in any event).[646] Due to the increase in transfer payments, DHS believes that the rule may also have indirect effects on businesses in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, and agricultural producers who grow foods that are eligible for purchase using SNAP benefits. However, DHS is unable to quantify this indirect effect due to the significant passage of time between the 1999 Interim Field Guidance and this proposed rule. DHS invites comment on the indirect effects of the proposed rule on businesses and nonprofits.

DHS believes that the rule may have indirect effects on State, local, and/or Tribal government as compared to the Pre-Guidance baseline. There may be costs to various entities associated with familiarization of and compliance with the provisions of the rule, including salaries and opportunity costs of time to monitor and understand regulation requirements, disseminate information, and develop or modify information technology (IT) systems as needed. It may be necessary for many government agencies to update guidance documents, forms, and web pages. It may be necessary to prepare training materials and retrain staff at each level of government, which will require additional staff time and will generate associated costs. However, DHS is unable to quantify these effects. DHS invites comment on the indirect effect of the proposed rule on State, local, and/or Tribal governments.

Due to the passage of a significant amount of time between the 1999 Interim Field Guidance and this proposed rule, DHS cannot quantify the effects that this proposed rule would have as compared to the Pre-Guidance baseline. For instance, although DHS could estimate the chilling effects of PRWORA and IIRIRA and the countervailing effects of the 1999 Interim Field Guidance, it would be challenging to apply such estimates to the 20-plus years since that time. A wide number of changes in the economy and Federal laws occurred during that time period that might have affected public benefits usage among the population most likely to be affected by the proposed rule. Thus, DHS is unable to quantify these effects.

d. Regulatory Alternative

Consistent with E.O. 12866, DHS considered the costs and benefits of available regulatory alternatives. One alternative that DHS considered was a rulemaking similar to the rulemaking that comprised the 2018 NPRM and the 2019 Final Rule (the Alternative). DHS considered both the effects of the 2018 NPRM and the 2019 Final Rule because the indirect disenrollment effects associated with the rulemaking began prior to the publication of the Final Rule. DHS sought to avoid underestimating the full impact the rulemaking had on the public.

As compared to the 1999 Interim Field Guidance, the 2019 Final Rule expanded the criteria used in public charge inadmissibility determinations. The 2019 Final Rule broadened the definition of ''public charge,'' both by adding new public benefits for consideration and by implementing a test under which receipt of the designated benefits for more than 12 months in the aggregate within a 36-month period would render a person a public charge.

The additional public benefits in the 2019 Final Rule were non-emergency Medicaid for non-pregnant adults, federally funded nutritional assistance (SNAP), and certain housing assistance, subject to certain exclusions for certain populations. In addition, the 2019 Final Rule required noncitizens to submit a declaration of self-sufficiency on a new form designated by DHS and required the submission of extensive initial evidence relating to the public charge ground of inadmissibility.

The 2019 Final Rule also provided, with limited exceptions, that certain applicants for extension of stay or change of nonimmigrant status would

[644] *Id.* at 1–2.

[645] *Id.*

[646] Relatively few noncitizens in the United States are both subject to INA 212(a)(4) and eligible for public benefits prior to adjustment of status (see Table 3 above).

be required to demonstrate that they have not received, since obtaining the nonimmigrant status they seek to extend or change and through the time of filing and adjudication, one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in 1 month counts as 2 months).

In order to estimate the effect of the Alternative relative to the Pre-Guidance baseline, DHS sums the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline with the effect of the Alternative relative to the No Action Baseline. Detailed discussion of the costs, benefits, and transfer payments of the Alternative relative to the No Action baseline is discussed below. The effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline under the Alternative is the same as discussed in the assessment of the proposed rule. This effect is discussed in the Pre-Guidance Baseline Section.

i. Direct Costs

Total direct costs resulting from the 2019 Final Rule were estimated to be approximately $35.4 million per year.[647] Total annual transfer payment decreases related to the 2019 Final Rule were estimated to be about $2.47 billion resulting from individuals (most of whom would likely not have been subject to the 2019 Final Rule) disenrolling from or forgoing enrollment in public benefit programs.[648] For purposes of estimating the costs and benefits of the Alternative, DHS updated its estimates of the total annual direct cost of and change in the total annual transfer payment increases related to the 2019 Final Rule.

After updating the costs from the 2019 Final Rule, DHS estimates the total annual direct costs of the Alternative would be approximately $86 million, as detailed below. These costs would include about $48,639,917 to the public to fill out and submit a new form I–944,[649] Declaration of Self-Sufficiency, which would require noncitizens to declare self-sufficiency and provide a range of evidence that DHS required for making public charge inadmissibility determinations under the 2019 Final Rule. There is also an estimated additional time burden cost of $25,743,022 to applicants who would be required to fill out and submit Form I–485;[650] $40,426 to public charge bond obligors for filing Form I–945,[651] Public Charge Bond; $946 to filers for submitting Form I–356,[652] Request for Cancellation of Public Charge Bond; and $7,201,007 to applicants for completing and filing forms I–129,[653] Petition for a Nonimmigrant Worker, $151,338 for I–129CW,[654] Petition for a CNMI-Only Nonimmigrant Transitional Worker, and $4,045,372 for I–539,[655] Application to Extend/Change Nonimmigrant Status to demonstrate that the applicant has not received public benefits since obtaining the nonimmigrant status that they are seeking to extend or change.[656]

ii. Transfer Payments

As noted above, the August 2019 Final Rule was also associated with widespread indirect effects, primarily with respect to those who were not subject to the August 2019 Final Rule in the first place, such as U.S.-citizen children in mixed-status households, longtime lawful permanent residents who are only subject to the public charge ground of inadmissibility in limited circumstances, and noncitizens in a humanitarian status who would be exempt from the public charge ground of inadmissibility in the context of adjustment of status.[657] DHS expects that similar effects would occur under the Alternative. DHS estimates that the total annual transfer payments from the Federal Government to public benefits recipients who are members of households that include noncitizens would be approximately $3.79 billion lower, as detailed below.

As noted below, DHS is unable to estimate the downstream effects that would result from such decreases. DHS expects that in some cases, a decrease in transfers associated with one program or service would include an increase in transfers associated with other programs or services, such as programs or services delivered by nonprofits.

In the 2019 Final Rule, DHS estimated the reduction in transfer payments by multiplying a disenrollment/forgone enrollment rate of 2.5 percent by an estimate of the number of public benefits recipients who are members of households that include noncitizens (*i.e.,* the population that may disenroll) and then multiplying the estimated population by an estimate of the average annual benefit received per person or household for the covered benefits.

In the 2019 Final Rule, DHS estimated the 2.5 percent disenrollment/forgone enrollment rate by dividing the annual number of adjustment of status applications by the estimated noncitizen population of the United States.[658] DHS

[647] *See* ''Inadmissibility on Public Charge Grounds,'' Final Rule, 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction,* 84 FR 52357 (Oct. 2, 2019).

[648] *Ibid.*

[649] Cost to file form I–944: Form I–944 Time burden estimated in the 2019 Final Rule (4.5 hour) * Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) * Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 17 (501,520) = $38,614,532 (rounded), Cost of obtaining credit report and score cost from Experian ($19.99) * Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 17 (501,520) = $10,025,385 (rounded). Total cost to file form I–944 = $38,614,532 + $10,025,385 = $48,639,917. DHS uses this burden hour estimate for consistency with the analysis in the 2019 Final Rule.

[650] Cost to file form I–485: Form I–485 Time burden increase estimated in the 2019 Final Rule (3 hour) * Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) * Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 17 (501,520) = $25,743,022 (rounded).

[651] Cost to file form I–945: Form I–945 Time burden estimated in the 2019 Final Rule (1 hour) * Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) * Estimated annual population in the 2019 Final Rule who would file Form I–945 (960) = $16,426 (rounded).

[652] Cost to file form I–356: (Form I–356 Time burden estimated in the 2019 Final Rule (0.75 hour) * Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) + Filing fee estimated in the 2019 Final Rule ($25)) * Estimated annual population in the 2019 Final Rule who would file Form I–356 (25) = ($12.83 + $25) *25 = $946 (rounded).

[653] Cost to file form I–129: Form I–129 Time burden increase estimated in the 2019 Final Rule (0.5 hour) * the total compensation from BLS discussed in Section VI.A.5 ($39.55) * Estimated annual population who would file Form I–129 using FY2014–FY2018 data from USCIS (364,147) = $7,201,007 (rounded).

[654] Cost to file form I–129CW: Form I–129 CW Time burden increase estimated in the 2019 Final Rule (0.5 hour) * the total compensation from BLS discussed in Section VI.A.5 ($39.55) * Estimated annual population who would file Form I–129CW using FY2014–FY2018 data from USCIS (7,653) = $151,338 (rounded).

[655] Cost to file form I–539: Form I–539 Time burden increase estimated in the 2019 Final Rule (0.5 hour) * the total compensation from BLS discussed in Section VI.A.5 ($39.55) * Estimated annual population who would file Form I–539 using FY2014–FY2018 data from USCIS (204,570) = $4,045,372 (rounded).

[657] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), *Immigrant Families Continued Avoiding the Safety Net during the COVID–19 Crisis 1* (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021). Several additional studies are cited in the discussion below, repeatedly finding that it was those individuals not subject to INA 212(a)(4) who typically chose to disenroll or refrain from enrolling in public benefits, due to fear of adverse consequences from the 2019 Final Rule throughout its rulemaking process. Relatively few noncitizens in the United States are both subject to INA 212(a)(4) and eligible for public benefits prior to adjustment of status (see Table 3 above).

[658] Calculation, based on 5-year averages over the period fiscal year 2012–2016: (544,246 receipts for I–485, adjustments of status/22,214,947 estimated noncitizen population) * 100 = 2.45 = 2.5% (rounded), 84 FR 41292, 41392–93 (Aug. 14, 2019). Source for estimated noncitizen population of 22,214,947, *see* U.S. Census Bureau American

Continued

estimated this disenrollment rate as the five-year average annual number of persons seeking to adjust status or as a percentage of the noncitizen population in the United States (2.5 percent). This estimate reflected an assumption that 100 percent of such noncitizens and their household members are either enrolled in or eligible for public benefits and will be sufficiently concerned about potential consequences of the policies proposed in this rule to disenroll or forgo enrollment in public benefits. The resulting transfer estimates will therefore have had a tendency toward overestimation, at least as it relates to the population that would be directly regulated by the 2019 Final Rule. DHS assumed that the population likely to disenroll from or forgo enrollment in public benefits programs in any year would be the expected annual number of individuals intending to apply for adjustment of status. But as discussed below, this approach appears to have resulted in an underestimate due to the documented chilling effects associated with the 2019 Final Rule among other parts of the noncitizen and citizen populations who were not part adjustment applicants or members of households of adjustment applicants and other noncitizens who were not adjustment applicants. For the low estimate, DHS uses the same methodology, but with updated data, to estimate the low rate of disenrollment or forgone enrollment due to the Alternative would be 3.1 percent.[659]

Since the publication of the 2019 Final Rule, several studies have been published that discuss the impact of the 2019 Final Rule on the rate of public benefit disenrollment or forgone enrollment, *i.e.,* a chilling effect. Studies conducted between 2016 and 2020 show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 36.1 percent.[660] [661] The results of these studies depend on several factors, such as the sample examined or the period or method of analysis. The Public Charge NPRM was published in late 2018 and the 2019 Final Rule was finalized in August 2019. The 2019 Final Rule became effective in February 2020. However, after subsequent legal challenges to the 2019 Final Rule, it was vacated in March 2021. Given this timeline, several studies show that the largest observed disenrollment from or forgone enrollment in public benefit programs occurred between 2018 and 2019.[662] Capps, R., Fix, M., & Batalova, J. (2020) looked at benefits usage across all groups and observed that enrollment was declining over this time period for all groups (albeit with consistently more significant reductions in enrollment among noncitizens or those in mixed-status households than among the public at large). Capps, R., Fix, M., & Batalova, J. (2020) attributed the reduction in enrollment in the overall U.S. population to the improving economic conditions between 2016 and 2019, although other factors may also have influenced these rates.[663]

Some studies examined different samples such as low-income noncitizens,[664] low-income citizen,[665] adults in immigrant families,[666] immigrant families with children,[667] or low-income immigrant adults.[668] The studies show that the 2019 Final Rule directly or indirectly affected adult noncitizens and indirectly affected adults in immigrant families who are lawful permanent residents or naturalized citizens.[669] One study shows that immigrant families with children reported a greater reduction in public benefit enrollment (20.4 percent) compared to immigrant families without children (10 percent) in 2019.[670] Another study shows the reduction in public benefit program enrollment also differs by the type of the public benefit program examined.[671] This study found reduced enrollment in SNAP, Medicaid/CHIP, and TANF and General Assistance (TANF/GA), but noted that the reduction was relatively larger for TANF/GA (12 percent annualized reduction among low-income individuals from 2016 to 2019) and SNAP (12 percent annualized reduction), as compared to Medicaid/CHIP (7 percent annualized reduction).[672] The study observed that participation in all three programs fell about twice as fast over the 2016 to 2019 period for U.S.-citizen children with noncitizens in the household as for

Database. ''S0501: Selected Characteristics of the Native and Foreign-born Populations 2012–2016 American Community Survey (ACS) 5-year Estimates. Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

[659] Calculation, based on 5-year averages over the period fiscal year 2014–2018: (690,837 receipts for I-485, adjustments of status/22,289,490 estimated noncitizen population) * 100 = 3.1 percent (rounded). 22,289,490 (estimated noncitizen population): U.S. Census Bureau American Database. ''S0501: Selected Characteristics of the Native and Foreign-born Populations 2014–2018 American Community Survey (ACS) 5-year Estimates. Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

[660] Capps, R., Fix, M., & Batalova, J. (2020). *Anticipated ''Chilling Effects'' of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families.* Migration Policy Institute, available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 19, 2022). Note: This study finds a 4.1-percent decrease in Medicaid/CHIP enrollment from 2016 to 2017 for low-income noncitizens.

[661] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), *Immigrant Families Continued Avoiding the Safety Net during the COVID–19 Crisis 1* (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

[662] Capps, R., Fix, M., & Batalova, J. (2020). *Anticipated ''Chilling Effects'' of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families.* Migration Policy Institute, available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 19, 2022).

[663] *See, e.g.,* Capps, R., Fix, M., & Batalova, J. ''Anticipated ''Chilling Effects'' of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families.'' Available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Feb. 10, 2022).

[664] *Ibid.* Capps, R., Fix, M., & Batalova, J. (2020).

[665] Sommers, B., Allen, H. Bhanja, A., Blendon, R., Orav, J., and Epstein, A., (2020). *Assessment of Perceptions of the Public Charge Rule Among Low-Income Adults in Texas,* JAMA Network.

[666] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (Urban Institute, 2019).

[667] Haley, JM., Kenney, GM., Bernstein, H., and Gonzalez, D. (2020), *One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019,* Urban Institute, *https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf.*

[668] Babey, SH, Wolstein, J., Shimkhada, R., Ponce NA (2021). *One in 4 Low-Income Immigrant Adults in California Avoided Public Programs, Likely Worsening Food Insecurity and Access to Health Care,* UCLA Center for Health Policy Research. *https://healthpolicy.ucla.edu/publications/Documents/PDF/2021/publiccharge-policybrief-mar2021.pdf.*

[669] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (Urban Institute, 2019).

[670] Haley, JM., Kenney, GM., Bernstein, H., and Gonzalez, D. (2020), *One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019,* Urban Institute, *https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf.*

[671] Capps, R., Fix, M., & Batalova, J. (2020). *Anticipated ''Chilling Effects'' of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families.* Migration Policy Institute, available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 19, 2022).

[672] *Ibid.* See Figure 1 for changes in participation by low-income noncitizens from 2016 to 2019 (37 percent decrease in SNAP, 37 percent decrease in TANF/GA, and 20 percent decrease in Medicaid/CHIP). DHS calculates annualized reduction among low-income noncitizen from 2016 to 2019: For TANF/GA (12 percent) = 37 percent/3 years = 12 (rounded), for SNAP (12 percent) = 37 percent/3 years = 12(rounded), and Medicaid/CHIP (7 percent) = 20 percent/3 years = 7(rounded).

those with only citizens in the household.

Due to the uncertainty of the rate of disenrollment or forgone enrollment in public benefits programs related to the 2019 Final Rule, DHS uses a range of rates to estimate the change in Federal Government transfer payments that would be associated with the Alternative.[673] For estimating the lower bound of the range, DHS uses a 3.1 percent rate of disenrollment or forgone enrollment in public benefits programs based on the estimation methodology from the 2019 Final Rule (as discussed above).

DHS bases the upper bound of the range on the results of studies by Bernstein, Gonzalez, Karpman, and Zuckerman (Bernstein et al. [2019] [674] and Bernstein et al. [2020] [675]), which provided an average of 14.7 percent rate of disenrollment or forgone enrollment in public benefits programs. These studies observed reductions in the public benefit participation rate for adults in immigrant families in 2018 and 2019. Bernstein et al. (2019; 2020) uses a population of nonelderly adults who are foreign born or living with a foreign-born relative in their household—this matches the population of mixed-status households for which DHS estimates for the Alternative the rate of disenrollment from or foregone future enrollment in a public benefits program. Other studies such as Capps et al. (2020) examined a chilling effect among low-income families, which only covers a subset of the population of interest. One study showed that in 2020, more than one in six adults in immigrant families (17.8 percent) reported avoiding a noncash government benefit program or other help with basic needs because of green card concerns or other worries about immigration status or enforcement. More than one in three adults in families in which one or more members do not have a green card (36.1 percent) reported these broader chilling effects.[676] Looking at the subset of the noncitizen population, however, shows a larger chilling effect as this smaller group likely experienced a larger disenrollment rate. However, this small population does not capture other noncitizen groups that might have also disenrolled in public benefits. DHS chose to use the two Bernstein studies described below, because the studies analyze the impact on the broader population of noncitizens, which includes the smaller subsets identified in the other studies.

Bernstein et al. (2019; 2020) examined beneficiaries of SNAP, Medicaid, and housing subsidies, which are public benefits programs considered for public charge inadmissibility determinations under the Alternative. However, Bernstein et al. (2019; 2020) does not include other public benefit programs considered for public charge inadmissibility determinations under the Alternative, such as TANF or SSI. Since DHS estimates the change in transfer payments for Medicaid, SNAP, TANF, SSI, and housing subsidies, DHS uses an overall average rate of chilling effect, based on the chilling effects reported by Bernstein et al. (2019; 2020).

Bernstein et al. (2019) showed that 13.7 percent of adults in immigrant families reported that they (*i.e.,* the respondent) or a family member avoided a noncash government benefit program in 2018. Bernstein et al. (2020) showed that 15.6 percent of adults in immigrant families reported that they (the respondent) or a family member avoided a noncash government benefit program in 2019. DHS calculates a simple average of these two percentages (13.7 percent and 15.6 percent) from the Bernstein et al. (2019; 2020) to arrive at the estimated annual decrease of 14.7 percent described above.

DHS uses 8.9 percent as the primary estimate in order to estimate the annual reduction in Federal Government transfer payments associated with the Alternative, which is the midpoint between the lower estimate (3.1 percent) and the upper estimate (14.7 percent) of disenrollment or forgone enrollment in public benefits programs. DHS chose to provide a range due to the difficulty in estimating the effect on various populations. For example, the lower bound estimate of a 3.1 percent rate of disenrollment or foregone enrollment may result in an underestimate to the extent that covered noncitizens may choose to disenroll from or forego enrollment in public benefits programs sooner than in the same year that the noncitizen applies for adjustment of status. Some noncitizens and members of their households may adjust their behavior in anticipation of eventually applying for adjustment of status, but not know exactly when they will submit such applications.

As well, DHS acknowledges that the upper bound estimate of a 14.7 percent rate of disenrollment or foregone enrollment may result in an underestimate since the Bernstein et al. (2019; 2020) studies did not include all the public benefit programs such as TANF and SSI. As shown in Capps, R., Fix, M., & Batalova, J. (2020) study, cash assistance public benefit programs, TANF/GA and SNAP experienced a greater rate in disenrollment relative to Medicaid/CHIP. On the other hand, the upper bound estimate of a 14.7 percent rate of disenrollment or foregone enrollment may result in an overestimate. While Capps, R., Fix, M., & Batalova, J. (2020) study noted that during the period between 2016 and 2019 the participation rate in public benefits was declining for both U.S. citizens and noncitizens (albeit at significantly different rates), the disenrollment rates produced in the Bernstein et al. (2019; 2020) studies did not control for the overall trend in the U.S. population at large.

Bernstein et al. (2019; 2020) population estimates are based on a nationally representative survey of nonelderly adults who are foreign born or living with a foreign-born relative in their household. From there, Bernstein et al. (2019; 2020) compare the disenrollment year over year for Medicaid/CHIP, SNAP, or housing subsidies to arrive at an overall disenrollment rate of 13.7 percent in 2018 and 15.6 percent in 2019.

[673] DHS seeks comment on potential methodologies to adjust these estimates to account for changes since the 2019 Final Rule was first implemented, including: (1) Disenrollment or benefits avoidance that has already occurred; (2) changes in the economy; (3) changes to public benefits eligibility; and (4) changes in public benefits participation rates following the vacatur of the 2019 Final Rule.

[674] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2019), *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (Urban Institute), available at *https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_8.pdf* (accessed Feb. 13, 2021).

[675] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019* (Urban Institute), available at *https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf* (accessed Feb. 13, 2021).

[676] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), *Immigrant Families Continued Avoiding the Safety Net during the COVID–19 Crisis 1* (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

Many studies discussed earlier in this section similarly attempted to measure the disenrollment or forgone enrollment rate due to the 2019 Final Rule. These studies show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 36.1 percent. DHS uses the estimates of the chilling effect by Bernstein et al. (2019; 2020) as a proxy because their population closely matches the population of interest for this analysis whereas the other studies looked at a smaller subset of the population. DHS welcomes public comments on the estimation of the disenrollment or foregone enrollment rate used in this analysis.

Using the primary estimate rate of disenrollment or forgone enrollment in public benefits programs of 8.9 percent, DHS estimates that the total annual reduction in transfer payments from the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs. Based on the data presented below, DHS estimates that the total annual reduction in transfer payments paid by the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $3.79 billion for an estimated 819,599 individuals and 31,940 households across the public benefits programs examined.

To estimate the reduction in transfer payments that under the Alternative, DHS must multiply the estimated disenrollment/forgone enrollment rate of 8.9 percent by: (1) The population of analysis (*i.e.,* those who may disenroll from or forgo enrollment in Medicaid, SNAP, TANF, SSI, and Federal rental assistance, the programs that would be covered under the Alternative); [677] and (2) the value of the forgone benefits.

Table 25 shows the estimated population of public benefits recipients who are members of households that include noncitizens. DHS assumes that this is the population of individuals who may disenroll from or forgo enrollment in public benefits under the Alternative. The table also shows estimates of the number of households with at least one noncitizen family member that may have received public benefits.[678] [679] Based on the number of households with at least one noncitizen family member, DHS estimates the number of public benefits recipients who are members of households that include at least one noncitizen who may have received benefits using the U.S. Census Bureau's estimated average household size for foreign-born households.[680] [681]

In order to estimate the population of public benefits recipients who are members of households that include at least one noncitizen DHS uses a 5-year average of public benefit recipients' data from FY 2014 to FY 2018. Although data from FY 2019 to FY 2021 were available, DHS opted not to use data from these years because the populations of public benefit recipients in those years were affected by both the 2019 Final Rule and the COVID–19 pandemic.

Consistent with the approach DHS took in the 2019 Final Rule, DHS's methodology was as follows. First, for most of the public benefits programs analyzed, DHS estimated the number of households with at least one person receiving such benefits by dividing the number of people that received public benefits by the U.S. Census Bureau's estimated average household size of 2.63 for the U.S. total population.[682] Second, DHS estimated the number of such households with at least one noncitizen resident. According to the U.S. Census Bureau population estimates, the noncitizen population is 6.9 percent of the U.S. total population.[683] While there may be some variation in the percentage of noncitizens who receive public benefits, including depending on which public benefits program one considers, DHS assumes in this economic analysis that the percentage holds across the populations of the various public benefits programs. Therefore, to estimate the number of households with at least one noncitizen who receives public benefits, DHS multiplies the estimated number of households for each public benefits program by 6.9 percent. This step may introduce uncertainty into the estimate because the percentage of households with at least one noncitizen may differ from the percentage of noncitizens in the population. However, if noncitizens tend to be grouped together in households, then an overestimation of households that include at least one noncitizen is more likely.

DHS then estimates the number of noncitizens who received benefits by multiplying the estimated number of households with at least one noncitizen who receives public benefits by the U.S. Census Bureau's estimated average household size of 3.31 for those who are foreign-born.[684]

BILLING CODE 9111–97–P

[677] DHS recognizes that the proposed rule would create a similar disincentive to receipt of TANF and SSI by certain noncitizens, although DHS expects that the scope and relative simplicity of this rule, and the fact that these benefits have been considered in public charge inadmissibility determinations since 1999, would mitigate chilling effects to some extent. Note that the Medicaid enrollment does not include child enrollment because the 2019 Final Rule did not include Medicaid or CHIP for children.

[678] *See* U.S. Census Bureau. *American Community Survey 2020 Subject Definitions.* Available at *https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2020_ACSSubjectDefinitions.pdf* (accessed Jan. 14, 2022). The foreign-born population includes anyone who was not a U.S. citizen or a U.S. national at birth, which includes respondents who indicated they were a U.S. citizen by naturalization or not a U.S. citizen. The ACS questionnaires do not ask about immigration status but uses responses to determine the U.S. citizen and non-U.S.-citizen populations as well as to determine the native and foreign-born populations. The population surveyed includes all people who indicated that the United States was their usual place of residence on the survey date. The foreign-born population includes naturalized U.S. citizens, lawful permanent residents, noncitizens with a nonimmigrant status (*e.g.,* foreign students), noncitizens with a humanitarian status (*e.g.,* refugees), and noncitizens present without a lawful immigration status.

[679] To estimate the number of households with at least 1 foreign-born noncitizen family member that have received public benefits, DHS calculated the overall percentage of total U.S. households that are foreign-born noncitizen as 6.9 percent. Calculation: [22,289,490 (Foreign-born noncitizens)/322,903,030 (Total U.S. population)] * 100 = 6.9 percent. *See* U.S. Census Bureau American Database. ''S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates.'' Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

[680] *See* U.S. Census Bureau American Database. ''S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates.'' Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022). The average foreign-born household size is reported as 3.31 persons. DHS multiplied this figure by the estimated number of benefits-receiving households with at least 1 foreign-born noncitizen receiving benefits to estimate the population living in benefits-receiving households that include a foreign-born noncitizen.

[681] In this analysis, DHS uses the American Community Survey (ACS) to develop population estimates along with beneficiary data from each of the benefits program. DHS notes that the ACS data were used for the purposes of this analysis because it provided a cross-sectional survey based on a random sample of the population each year including current immigration classifications. Both surveys reflect use by noncitizens of the public benefits included in the Alternative.

[682] *See* U.S. Census Bureau Database. ''S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates.'' Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

[683] *Ibid.* Calculation: [22,289,490 (Foreign-born noncitizens)/322,903,030 (Total U.S. population)] * 100 = 6.9 percent.

[684] *See* U.S. Census Bureau Database. ''S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates.'' Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

Table 25. Estimated Population of Public Benefits Recipients Who Are Members of Households that Include at Least One Noncitizen, FY 2014 – FY 2018

Public Benefits Program	Average Annual Total Number of Recipients[1]	Households that May Be Receiving Benefits[2]	Benefits-Receiving Households with at Least One Noncitizen[3]	Public Benefits Recipients Who Are Members of Households Including at Least One Noncitizen[4]
Medicaid[5]	38,070,865	14,475,614	998,817	3,306,084
Supplemental Nutrition Assistance Program (SNAP)[6]	N/A	21,630,217	1,492,485	4,940,125
Temporary Assistance for Needy Families (TANF)[7]	2,836,073	1,078,355	74,406	246,284
Supplemental Security Income (SSI)[8]	8,250,666	3,137,135	216,462	716,489
Federal Rental Assistance[9]	N/A	5,199,000	358,731	N/A

Sources and Notes: USCIS analysis of data provided by the Federal agencies that administer each of the listed public benefits program or research organizations.

[1] Figures for the average annual total number of recipients are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available (2014-2018). For more information, please *see* the document "Economic Analysis Supplemental Information for Analysis of Public Benefits Programs" in the online docket for the proposed rule.

[2] DHS estimated the number of households by dividing the number of people that received public benefits by the U.S. Census Bureau's estimated average household size of 2.63 for the U.S. total population. *See* U.S. Census Bureau Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2014 – 2018 American Community Survey (ACS) 5-year Estimates." Available at *https://data.census.gov/cedsci* (accessed Jan. 14, 2022). Note that HUD Rental Assistance and HUD Housing Choice Vouchers programs report data on the household level. Therefore, DHS did not use this calculation to estimate the average household size and instead used the data as reported.

[3] To estimate the number of benefits-receiving households with at least one foreign-born noncitizen, DHS multiplied the estimated number of households receiving benefits in the United States by 6.9 percent, which is the foreign-born noncitizen population as a percentage of the U.S. total population using U.S. Census Bureau population estimates. *See Ibid.*

[4] To estimate the population of public benefits recipients who are members of households that include foreign-born noncitizens, DHS multiplied the estimated number of benefits-receiving households with at least one foreign-born noncitizen by the average household size of 3.31 for those who are foreign-born using the U.S. Census Bureau's estimate. *See Ibid.*

[5] Medicaid – *See* U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS). Monthly Medicaid & CHIP Application, Eligibility Determination, and Enrollment Reports & Data. Available at *https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/monthly-reports/index.html*. Accessed Jan. 14, 2022. Note that each annual total was calculated by averaging the monthly enrollment population over each year. The numbers that were used for the average can be found in Table 1A: Medicaid and CHIP for each month, using the number listed as the "Total Across All States." through the Sept. 2018 report and in the Data.Medicaid.gov interactive database from Oct. 2018 onwards. DHS used "Total Medicaid Enrollment" data for its estimates. Also, note that per enrollee Medicaid costs vary by eligibility group and State. Note that consistent with the analysis conducted for the 2019 Final Rule, the Medicaid enrollment does not include child enrollment. Although DHS did not include Medicaid CHIP for children in the 2019 Final Rule, DHS is aware of evidence of disenrollment effects that would not be captured here

[6] SNAP – *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. "National and/or State Level Monthly and/or Annual Data: Persons, Households, Benefits, and Average Monthly Benefit per Person & Household," "FY69 through FY22." Available at *https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap*. Accessed Jan. 14, 2022. The number of households receiving SNAP benefits in this table is not calculated using average U.S. household size. Rather, it is 5-year average (FY2014-FY2018) of the number of households as reported by the U.S. Department of Agriculture from the website listed in this footnote.

[7] TANF – *See* U.S. HHS, Office of Family Assistance. "TANF Caseload Data." Available at *https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2018*; *https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2017*;

https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2016;

https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2015; and

https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2014. Accessed Jan. 14, 2022. Note: The number of participants is listed for the fiscal year, not calendar year since the dollar amount of assistance received is only presented for fiscal years.

[8] SSI – *See* U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. Annual Report of the Supplemental Security Income Program, 20182021. Table IV.B9, p. 4847. Available at *https://www.ssa.gov/OACT/ssir/SSI21/ssi2021.pdf*; *https://www.ssa.gov/oact/ssir/SSI18/ssi2018.pdf*. Accessed Jan. 14, 2022. *See* also U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. "SSI Recipients by State and County, 2018," available at *https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/index.html*. "SSI Monthly Statistics, January 2018." Available at *https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2018/table01.html*. Accessed Jan. 14, 2022. Note that the link shows fiscal year 2018 data, but links to data for other fiscal years can also be accessed.

[9] Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total recipient households: *See* Center on Budget and Policy Priorities. National and State Housing Fact Sheets & Data. *See* Federal Rental Assistance, "Download the Data." and Housing Choice Voucher Program, "Download the Data." Available at *https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data*. Accessed Jan. 14, 2022. Note that "Federal Rental Assistance" includes HUD Section 8 Project-based Rental Assistance, HUD Section 8 Housing Choice Vouchers, HUD Public Housing, HUD Section 202/811, and USDA Section 521.

In order to estimate the economic impact of disenrollment or forgone enrollment from public benefits programs, it is necessary to estimate the typical annual public benefits a person receives for each public benefits program included in this economic analysis. DHS estimated the annual benefit received per person for each public benefit program in Table 26. For each benefit but Medicaid, the benefit per person is calculated for each public benefit program by dividing the average annual program payments for public benefits by the average annual total number of recipients.[685] For Medicaid, DHS uses Centers for Medicare & Medicaid Services' (CMS) median per capita expenditure estimate across all States for 2018. To the extent that data are available, these estimates are based on 5-year annual averages for the years between FY 2014 and FY 2018.

[685] DHS notes that the amounts presented may not account for overhead costs associated with administering each of these public benefits programs. The costs presented are based on amounts recipients have received in benefits as reported by benefits-granting agencies.

Table 26. Estimated Annual Benefit per Person, by Public Benefit Program, FY 2014 – FY 2018.

Public Benefits Program	Average Annual Total Number of Recipients	Average Annual Public Benefits Payments	Annual Benefit per Person or Household[1]
Medicaid[2]	*N/A*	*N/A*	$8,168
Supplemental Nutrition Assistance Program (SNAP)[3]	43,948,386	$66,161,985,577	$1,505
Temporary Assistance for Needy Families (TANF)[4]	2,836,073	$3,840,827,013	$1,354
Supplemental Security Income (SSI)[5]	8,250,666	$54,684,600,000	$6,628
Federal Rental Assistance[6]	5,199,000	$43,834,000,000	$8,431

Sources and notes: USCIS analysis of data provided by the Federal agencies that administer each of the listed public benefits program or research organizations.

Note that figures for the average annual total number of recipients and the annual total public benefits payments are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available (2014-2018). For more information, please *see* the document "Economic Analysis Supplemental Information for Analysis of Public Benefits Programs" in the online docket for the proposed rule. Note that DHS acknowledges that there could be overlap among participants in the listed public benefit programs.

[1] Calculation: Average Annual Benefit per Person = (Average Annual Public Benefits Payments) / (Average Annual Total Number of Recipients). Note: Calculations may not be exact due to rounding.

[2] Medicaid- Data on Medicaid Per Capita Expenditures available at *https://www.medicaid.gov/state-overviews/scorecard/how-much-states-spend-per-medicaid-enrollee/index.html*. Accessed Jan. 14, 2022. Table 1. Per capita Expenditure Estimates for States and Data Quality Assessment (2018). Column "Total," Row "Median"

[3] SNAP – Data on the annual program expenditure on public benefits: *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. "National and/or State Level Monthly and/or Annual Data: Persons, Households, Benefits, and Average Monthly Benefit per Person & Household," "FY69 through FY22 National View Summary." Available at *https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap*. Accessed Jan. 14, 2022.

[4] TANF – Data on annual program expenditure on public benefits: *See* U.S. HHS, Office of Family Assistance. "TANF Financial Data." *See* Table A.1.: Federal TANF and State MOE Expenditures Summary by ACF-196 Spending Category, Federal Funds for Basic Assistance. Available at *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2018*; *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2017*; *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2016*; *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2015*; and *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2014*. Accessed Jan. 14, 2022.

[5] SSI – Data on the annual program expenditure on public benefits: *See* U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. *Annual Report of the Supplemental Security Income Program, 2021*. Table IV.B9—SSI Recipients with Federally Administered Payments in Current-Payment Status, p. 48 (recipients) and Table IV.C1.—SSI Federal Payments, p. 48. Available at: *https://www.ssa.gov/OACT/ssir/SSI21/ssi2021.pdf*. Accessed Jan. 14, 2022; *See also* U.S. Social Security Administration, Office of Research, Statistics & Policy Analysis. "SSI Recipients by State and County, Table 1" Available at *https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/index.html*. Accessed Jan. 14, 2022. Note that the link shows fiscal year 2018 data, but links to data for other fiscal years can also be accessed.

[6] Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total expenditure on public benefits: *See* Center on Budget and Policy Priorities. *National and State Housing Fact Sheets & Data*. Federal Rental Assistance, "Download the Data" and Housing Choice Voucher Program, "Download the Data." Available at *https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data*. Accessed Jan. 14, 2022.

As discussed earlier, using the midpoint reduction rate of 8.9 percent, Table 27 shows the estimated population that would be likely to disenroll or forgo enrollment in a federally-funded public benefits program under the Alternative.

Table 27. Estimated Population of Members of Households Including at Least One Noncitizen Likely to Disenroll or Forgo Enrollment in a Public Benefits Program.

Public Benefits Program	Public Benefits Recipients Who Are Members of Households Including at Least One Noncitizen[1]	Benefits-Receiving Households with At Least One Noncitizen [1]	Members of Benefits-Receiving Households Including Noncitizens Based On A 8.9% Rate of Disenrollment or Forgone Enrollment[2]	Benefits-Receiving Households with At Least One Noncitizen Based On A 8.9% Rate of Disenrollment or Forgone Enrollment[3]
Medicaid	3,306,084		294,241	
Supplemental Nutrition Assistance Program (SNAP)	4,940,125		439,671	
Temporary Assistance for Needy Families (TANF)	246,284		21,919	
Supplemental Security Income (SSI)	716,489		63,768	
Federal Rental Assistance	N/A	358,731	N/A	31,927
Totals	**9,208,982**	**358,731**	**819,599**	**31,927**

Source: USCIS analysis.

Notes:

[1] *See* Table 25.

[2] To estimate the population that could choose to disenroll/forgo enrollment, DHS multiplied the population of public benefits recipients who are members of benefits-receiving households including foreign-born noncitizens by 8.9 percent (the midpoint reduction rate). Note that 819,599 total does not include individuals who may have disenrolled from the HUD Federal Rental Assistance. The 31,927 total reports the number of households who may have disenrolled from the HUD Federal Rental Assistance, but the number of individuals affected by the disenrollment from HUD Federal Rental Assistance may be greater than 31,927 because there is more than one member per household.

[3] To estimate the population that could choose to disenroll/forgo enrollment, DHS multiplied the number of households with at least one foreign-born noncitizen by 8.9 percent (the midpoint reduction rate).

Multiplying the 501,520 status adjustments per year (per Table 17, above) by 3.31 (average size of households that include foreign-born non-citizens) and then applying average benefit program participation rates—calculated by dividing the enrollment numbers in Table 26 by the total U.S. population—would yield the following alternative estimates: Medicaid: 222,000; SNAP: 14,000; TANF: 42,000; SSI: 26,000.

BILLING CODE 9111–97–C

Table 27 shows the estimated population that would be likely to disenroll from or forgo enrollment in federally-funded public benefits programs due to the Alternative's indirect chilling effect. The table also presents the previously estimated average annual benefit per person who received benefits for each of the public benefits programs.[686] Multiplying the estimated population that would be likely to disenroll from or forgo enrollment in public benefit programs due to the Alternative by the average annual benefit per person who received benefits for each of the public benefit programs, DHS estimates that the total annual reduction in transfer payments paid by the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $3.79 billion for an estimated 819,599 individuals and 31,927 households across the public benefits programs examined. As these estimates reflect only Federal financial participation in programs whose costs are shared by U.S. States, there may also

[686] As previously noted, the average annual benefits per person amounts presented may not account for overhead costs associated with administering each of these public benefits programs since they are based on amounts recipients have received in benefits as reported by benefits-granting agencies. Therefore, the costs presented may underestimate the total amount of transfer payments to the Federal Government.

be additional reductions in transfer payments from U.S. States to individuals who may choose to disenroll from or forgo enrollment in a public benefits program.

Since the Federal share of Federal financial participation (FFP) varies from State to State, DHS uses the average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories of 59 percent to estimate the total reduction of transfer payments for Medicaid.[687] Table 28 shows that Federal annual transfer payments for Medicaid would be reduced by about $2.4 billion under the Alternative. From this amount and the average FMAP of 59 percent, DHS calculates the total reduction in transfer payments from Federal and State governments to individuals to be about $4.07 billion.[688] From that total amount, DHS estimates State annual transfer payments would be reduced by approximately $1.67 billion due to the disenrollment or forgone enrollment of foreign-born noncitizens and their households from Medicaid.[689]

For SNAP, TANF and Federal Rental Assistance, the Federal Government pays 100 percent of benefits values included in Table 26 and Table 27 above. Therefore, Table 28 shows the Federal share of annual transfer payments would be about $0.96 billion for SNAP, TANF, and Federal Rental Assistance.[690] Federal, State, and local governments share administrative costs (with the Federal Government contributing approximately 50 percent) for SNAP.[691] Federal TANF funds can be used for administrative TANF costs, up to 15 percent of a state's family assistance grant amount. [692] For SSI, the maximum Federal benefit changes yearly. Effective January 1, 2018, the rate was $750 monthly for an individual and $1,125 for a couple. Some States supplement the Federal SSI benefit with additional payments, which make the total SSI benefit levels higher in those States.[693] Moreover, the estimates of expenditures for Federal Rental relate to purely Federal funds, although housing programs are administered by State and local public housing authorities which may supplement program funding. Those authorities would incur administrative costs. However, DHS is unable to quantify the State portion of the transfer payment due to a lack of data related to State-level administration of these public benefit programs. DHS welcomes public comments on data related to the State contributions and share of costs of these public benefit programs.

BILLING CODE 9111–97–P

[687] *See* Dept. of Health and Human Servs. Notice, Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2016, through September 30, 2017, 80 FR 73779 (Nov. 25, 2015).

[688] Total annual Federal and State reduction in transfer payment for Medicaid = (Estimated Reduction in Transfer Payments Based On A 8.9% Rate of Disenrollment or Forgone Enrollment for Medicaid from Table 28)/(average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories) = $2,403,360,488/0.59 = $4.07 billion (rounded).

[689] State annual reduction in transfer payment for Medicaid = Total annual Federal and State reduction in transfer payment for Medicaid − Federal annual reduction in transfer payment for Medicaid = $4.07 billion − $2.40 billion = $1.67 billion.

[690] From Table 29 transfer payment reduction for SNAP is $661,704,855, for TANF is $29,678,326, and for Federal Rental Assistance is $269,177,034. Calculation of the sum: $960,560,215 ($0.96 billion).

[691] *See* USDA, Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2019 at 1, available at *https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2019.pdf,* (accessed Feb. 14, 2022). DHS notes that because State participation in these programs may vary depending on the type of benefit provided, we were unable to fully or specifically quantify the impact of State transfers. For example, the Federal Government funds all of SNAP food expenses, but only 50 percent of allowable administrative costs for regular operating expenses (per section 16(a) of the Food and Nutrition Act of 2008). See also USDA, FNS Handbook 901, p. 41 available at: *https://fns-prod.azureedge.net/sites/default/files/apd/FNS_HB901_v2.2_Internet_Ready_Format.pdf*). Similarly, Federal Medical Assistance Percentages (FMAP) in some HHS programs like Medicaid can vary from between 50 percent to an enhanced rate of 100 percent in some cases (*see* HHS, Notice, Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2016 through September 30, 2017, 80 FR 73779 (Nov. 25, 2015)). Since the State share of Federal financial participation (FFP) varies from State to State, DHS uses the average FMAP across all States and U.S. territories of 59 percent to estimate the amount of State transfer payments.

[692] *See* 45 CFR 263.13(a)(i).

[693] *See* SSI information available at *https://www.ssa.gov/policy/docs/statcomps/supplement/2018/ssi.html.*

Table 28. Total Estimated Reduction in Transfer Payments Paid by the Federal Government Due to Disenrollment or Forgone Enrollment in Public Benefits Programs.

Public Benefits Program	Public Benefits Recipients Who Are Members of Households Including Noncitizens Based On A 8.9% Rate of Disenrollment or Forgone Enrollment	Households Receiving Benefits with At Least One Noncitizen Based On A 8.9% Rate of Disenrollment or Forgone Enrollment	Average Annual Benefit per Person or Household	Estimated Reduction in Transfer Payments Based On A 8.9% Rate of Disenrollment or Forgone Enrollment
Medicaid[1]	294,241		$8,168	$2,403,360,488
Supplemental Nutrition Assistance Program (SNAP)	439,671		$1,505	$661,704,855
Temporary Assistance for Needy Families (TANF)	21,919		$1,354	$29,678,326
Supplemental Security Income (SSI)	63,768		$6,628	$422,654,304
Federal Rental Assistance		31,927	$8,431	$269,177,034
Totals	**819,599**	**31,927**	*N/A*	**$3,786,575,007**

Source: USCIS analysis.

Notes:

[1] Neither HHS nor DHS are able to disaggregate emergency and non-emergency Medicaid expenditures. Therefore, this rule considers overall Medicaid expenditures. Note that per enrollee Medicaid costs vary by eligibility group and State.

As shown in Table 29, applying the same calculations using the low estimate of 3.1 percent DHS estimates that the total annual reduction in transfer payments paid by the Federal government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $1.32 billion for an estimated 285,479 individuals and 11,121 households across the public benefits programs examined. For the high estimate of 14.7 percent DHS estimates that the total annual reduction in transfer payments paid by the Federal government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $6.25 billion for an estimated 1,353,720 individuals and 52,733 households across the public benefits programs examined.

Table 29. Comparison of the High, Low, and Primary Total Estimated Reduction in Transfer Payments Paid by the Federal Government Due to Disenrollment or Forgone Enrollment in Public Benefits Programs.

Public Benefits Program	Estimated Annual Reduction in Transfer Payments Based on a 3.1% Rate of Disenrollment or Forgone Enrollment	Estimated Annual Reduction in Transfer Payments Based on an 8.9% Rate of Disenrollment or Forgone Enrollment	Estimated Annual Reduction in Transfer Payments Based on a 14.7% Rate of Disenrollment or Forgone Enrollment
Medicaid[1]	$837,130,152	$2,403,360,488	$3,969,598,992
Supplemental Nutrition Assistance Program (SNAP)	$230,481,720	$661,704,855	$1,092,927,990
Temporary Assistance for Needy Families (TANF)	$10,337,790	$29,678,326	$49,020,216
Supplemental Security Income (SSI)	$147,214,508	$422,654,304	$698,087,472
Federal Rental Assistance	$93,758,293	$269,177,034	$444,595,776
Totals	**$1,318,922,463**	**$3,786,575,007**	**$6,254,230,446**

BILLING CODE 9111–97–C

In the 2019 Final Rule, DHS anticipated that USCIS' review of public charge inadmissibility would substantially increase the number of denials for adjustment of status applicants because of the rule's provisions and process for public charge determinations. However, USCIS data show that the 2019 Final Rule did not result in the anticipated increase in denials of adjustment of status applications based on the public charge ground of inadmissibility during the period it was in effect between February 2020 and March 2021. During the year the 2019 Final Rule was in effect, DHS issued only 3 denials and 2 Notices of Intent to Deny based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)–(B) of the Act, 8 U.S.C. 1182(a)(4)(A)–(B). The 2019 Final Rule thus resulted in adverse decisions in only 5 of the 47,555 applications for adjustment of status to which it was applied.[694 695]

[694] USCIS Field Operations Directorate (June 2021); USCIS Office of Performance and Quality (June 2021).

[695] USCIS, Field Office Directorate, October 18, 2021.

Comparison of the total direct annual cost between the current proposed rule and the Alternative show that the direct costs of the Alternative is greater than that of the proposed rule. Although the Alternative would indirectly have the effect of a larger reduction of transfer payments than the proposed rule, likely primarily among those not regulated by the Alternative, transfer payments are not considered to be costs or benefits of a rule. Rather, they are transfers from one group to another group that do not result in a net gain or loss to society.

For instance, Bernstein et al. (2020) found that the chilling effect on public benefits associated with the 2019 Final Rule is partially attributable to confusion and misunderstanding. That study finds that two-thirds of adults in immigrant families (66.6 percent) were aware of the 2019 Final Rule, and 65.5 percent were confident in their understanding about the rule. Yet only 22.7 percent knew it does not apply to applications for naturalization, and only 19.1 percent knew children's enrollment in Medicaid would not be considered in their parents' public charge determinations. These results suggest that under the Alternative, parents might pull their eligible U.S.-citizen children out of crucial benefit programs, and current lawful permanent residents might choose not to enroll in safety net programs for which they might be eligible for fear of risking their citizenship prospects.[696]

iii. Additional Indirect Effects

DHS notes that there would likely be additional indirect effects related to increased disenrollment or forgone enrollment in public benefit programs. In the 2019 Final Rule, DHS recounted at length the many detailed comments received regarding the importance of public benefits programs, and the social harms associated with benefits disenrollment and avoidance.[697] DHS

[696] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019* (Urban Institute).

[697] *See, e.g.,* 84 FR at 43130–43134, 41364–41392. DHS notes that this conclusion is similar to the INS's reasoning when issuing the 1999 Interim Field Guidance. In issuing that policy, the INS wrote that a policy that led to benefits disenrollment or avoidance would have ''an adverse impact not just on the potential recipients, but on public health and the general welfare.'' *See* 64 FR at 28692.

''acknowledge[d] the positive outcomes associated with public benefits programs'' [698] and concluded that ''the rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children.'' [699] Similarly, in the RIA accompanying the 2019 Final Rule, DHS wrote that ''[d]isenrollment or foregoing enrollment in public benefits programs by aliens who are otherwise eligible could lead to the following:

- Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated;
- Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient;
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment.'' [700]

DHS also—

> recognize[d] that reductions in federal and state transfers under federal benefit programs may have impacts on state and local economies, large and small businesses, and individuals. For example, the rule might result in reduced revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.[701]

In another section of the 2019 Final Rule, DHS stated that it had ''determined that the rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children.'' [702]

At the time of the 2019 Final Rule's issuance, one study estimated that as many as 3.2 million fewer persons might receive Medicaid due to fear and confusion surrounding the 2019 Final Rule, which could lead to as many as 4,000 excess deaths every year.[703] The same study estimated that 1.8 million fewer people would use SNAP benefits, even though many of them are U.S. citizens. In addition, loss of Federal housing security would likely lead to worse health outcomes and dependence on other elements of the social safety net for some persons. As noted above, Executive Orders 12866 and 13563 direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In addition, Executive Order 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and human dignity. DHS recognizes that many of the indirect effects discussed in this section implicate values such as equity, fairness, distributive impacts, and human dignity. DHS acknowledges that although many of these effects are difficult to quantify, they would be an indirect cost of the Alternative.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA),[704] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[705] requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[706]

The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. It does not mandate any actions or requirements for small entities in the process of a Form I–485 Adjustment of Status requestor seeking immigration benefits. Rather, this proposed rule regulates individuals, and individuals are not defined as ''small entities'' by the RFA.[707] Based on the evidence presented in this analysis and throughout this preamble, the Secretary of Homeland Security certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. DHS nonetheless welcomes comments regarding potential economic impacts on small entities, which DHS may consider as appropriate in a final rule.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value of $100 million in 1995 is approximately $177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI–U).[708]

The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate.[709] The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[710] The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the

[698] *See* 84 FR at 41381.

[699] *See* 84 FR at 41493.

[700] *See* DHS, Regulatory Impact Analysis: Inadmissibility on Public Charge Grounds Final Rule, RIN 1615–AA22 at 109 (Aug. 2019), *available at https://www.regulations.gov/document/USCIS-2010-0012-63741* (accessed Jan. 27, 2022).

[701] *Id.* at 6.

[702] 84 FR 41292, 41493 (Aug. 14, 2019).

[703] Leighton Ku, ''New Evidence Demonstrates That the Public Charge Rule Will Harm Immigrant Families and Others,'' HEALTH AFFS (Oct. 9, 2019), *https://www.healthaffairs.org/do/10.1377/hblog20191008.70483/full.*

[704] 5 U.S.C. Ch. 6.

[705] Public Law 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note).

[706] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act (15 U.S.C. 632).

[707] 5 U.S.C. 601(6).

[708] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf.* Steps in calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the most recent current year available (2021); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100.

Calculation of inflation: [(Average monthly CPI–U for 2021 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(270.970 − 152.383)/152.383] * 100 = (118.587/152.383) * 100 = 0.7782 * 100 = 77.82 percent = 77.8 percent (rounded).

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.778 = $177.8 million in 2021 dollars.

[709] *See* 2 U.S.C. 1502(1), 658(6).

[710] 2 U.S.C. 658(5).

private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[711]

This proposed rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.[712] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the RIA above. DHS welcomes comments on this analysis.

D. Executive Order 13132 (Federalism)

Executive Order 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of the Unfunded Mandates Act. This proposed rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. DHS welcomes comments on this assessment.

E. Executive Order 12988 (Civil Justice Reform)

This proposed rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this proposed rule meets the applicable standards provided in section 3 of E.O. 12988.

[711] 2 U.S.C. 658(7).

[712] *See* 2 U.S.C. 1502(1), 658(6).

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule does not have ''tribal implications'' because, if finalized, it would not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, although there are references to Indian Tribes in this proposed rule. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

G. Family Assessment

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Agencies must assess whether the regulatory action: (1) Impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) financially impacts families, if at all, only to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; and (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the determination is affirmative, then the agency must prepare an impact assessment to address criteria specified in the law.

DHS has analyzed this proposed regulatory action in accordance with the requirements of section 654 and determined that this proposed rule does not affect family well-being, and therefore DHS is not issuing a Family Policymaking Assessment.

H. National Environmental Policy Act

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an environmental assessment or environmental impact statement. 40 CFR 1507.3(e)(2)(ii) and 1501.4. The Instruction Manual, Appendix A, Table 1 lists categorical exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a–c).

This proposed rule applies to applicants for admission or adjustment of status as long as the individual is applying for an immigration status that is subject to the public charge ground of inadmissibility. As discussed in detail above, this proposed rule establishes a definition of public charge and specifies the types of public benefits that DHS would consider as part of its public charge inadmissibility determinations. This list of benefits is the same as under the 1999 Interim Field Guidance that governed public charge inadmissibility determinations for over 20 years. This list of public benefits is narrower than under the 2019 Final Rule. The proposed rule, if finalized, would codify a totality of the circumstances framework for the analysis of the factors, including statutory minimum factors, used to make public charge inadmissibility determinations. The proposed rule does not propose to make changes to the regulations governing public charge bonds.

Given the similarity between the proposed rule and the 1999 Interim Field Guidance with respect to public charge inadmissibility determinations, DHS does not anticipate any change in the number of individuals admitted to the United States under the proposed rule. DHS is unable to quantitatively estimate any such change, and any assessment of potential derivative environmental effects at the national level would be unduly speculative.

DHS has therefore determined that this proposed rule clearly fits within Categorical Exclusion A3(d) in DHS

Instruction Manual 023–01–001–01, the Department's procedures for implementing NEPA issued November 6, 2014 (available at *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf),* because it interprets or amends a regulation without changing its environmental effect.

This proposed rule is a standalone action to prescribe standards regarding inadmissibility determinations on public charge grounds, and it is not part of a larger action. This proposed rule will not result in any major Federal action that will significantly affect the quality of the human environment. Furthermore, it presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this proposed rule is categorically excluded from further NEPA review.

I. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule unless they are exempt.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0023 in the body of the letter and the agency name. Use only the method under the **ADDRESSES** and Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Register Permanent Residence or Adjust Status.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–485, Supplement A, and Supplement J; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The information on Form I–485 will be used to request and determine eligibility for adjustment of permanent residence status. Supplement A is used to adjust status under section 245(i) of the Immigration and Nationality Act. Supplement J is used by employment-based applicants for adjustment of status who are filing or have previously filed Form I–485 as the principal beneficiary of a valid Form I–140 in an employment-based immigrant visa category that requires a job offer.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–485 is 690,837 and the estimated hour burden per response is 7.92 hours. The estimated total number of respondents for the information collection Supplement A is 29,213 and the estimated hour burden per response is 1.25 hour. The estimated total number of respondents for the information collection Supplement J is 37,358 and the estimated hour burden per response is 1 hour. The estimated total number of respondents for the information collection of Biometrics is 690,837 and the estimated hour burden per response is 1.17 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 6,353,583 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $236,957,091.

VII. List of Subjects and Regulatory Amendments

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 1. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; section 7209 of Pub. L. 108–458 (8 U.S.C. 1185 note); Title VII of Pub. L. 110–229 (8 U.S.C. 1185 note); 8 CFR part 2; Pub. L. 115–218.

Section 212.1(q) also issued under section 702, Public Law 110–229, 122 Stat. 754, 854.

■ 2. Amend § 212.18 by revising paragraphs (b)(2) and (3) to read as follows:

§ 212.18 Application for Waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders

* * * * *

(b) * * *

(2) If an applicant is inadmissible under section 212(a)(1) of the Act, USCIS may waive such inadmissibility if it determines that granting a waiver is in the national interest.

(3) If any other applicable provision of section 212(a) renders the applicant inadmissible, USCIS may grant a waiver of inadmissibility if the activities rendering the alien inadmissible were caused by or were incident to the victimization and USCIS determines that it is in the national interest to waive the applicable ground or grounds of inadmissibility.

■ 3. Add §§ 212.20 through 212.23 to read as follows:

Sec.

* * * * *

§ 212.20 Applicability of public charge inadmissibility.

Sections 212.20 through 212.23 address the public charge ground of inadmissibility under section 212(a)(4) of the Act. Unless the alien requesting the immigration benefit or classification has been exempted from section 212(a)(4) of the Act as listed in § 212.23(a), the provisions of this section through § 212.23 apply to an applicant for admission or adjustment of status to that of a lawful permanent resident.

§ 212.21 Definitions.

For the purposes of §§ 212.20 through 212.23, the following definitions apply:

(a) *Likely at any time to become a public charge* means likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

(b) *Public cash assistance for income maintenance* means:

(1) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.*;

(2) Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.*; or

(3) State, Tribal, territorial, or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names).

(c) *Long-term institutionalization at government expense* means long-term government assistance for institutionalization (in the case of Medicaid, limited to institutional services under section 1905(a) of the Social Security Act) received by aliens, including in a nursing home or mental health institution. Long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods for rehabilitation purposes.

(d) *Receipt (of public benefits).* Receipt of public benefits occurs when a public benefit-granting agency provides public cash assistance for income maintenance or long-term institutionalization at government expense to an alien, where the alien is listed as a beneficiary. Applying for a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits by such alien. Approval for future receipt of a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits. An alien's receipt of public benefits solely on behalf of another individual does not constitute receipt of public benefits. The receipt of public benefits solely by another individual, even if an alien assists with the application process, does not constitute receipt for such alien.

(e) *Government* means any Federal, State, Tribal, territorial, or local government entity or entities of the United States.

§ 212.22 Public charge inadmissibility determination.

(a) *Factors to consider*—(1) *Consideration of minimum factors:* For purposes of a public charge inadmissibility determination, DHS will at a minimum consider the alien's:

(i) Age;

(ii) Health;

(iii) Family status;

(iv) Assets, resources, and financial status; and

(v) Education and skills.

(2) *Consideration of affidavit of support.* DHS will favorably consider an affidavit of support under section 213A of the INA, when required under section 212(a)(4)(C) or (D) of the Act, that meets the requirements of section 213A of the Act and 8 CFR 213a, in making a public charge inadmissibility determination.

(3) *Consideration of current and/or past receipt of public benefits:* DHS will consider the alien's current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense (consistent with § 212.21(c)). DHS will consider such receipt in the totality of the circumstances, along with the other factors. DHS will consider the amount and duration of receipt, as well as how recently the alien received the benefits, and for long-term institutionalization, evidence submitted by the applicant that the applicant's institutionalization violates federal law, including the Americans with Disabilities Act or the Rehabilitation Act. However, current and/or past receipt of these benefits will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge.

(4) *Disability alone not sufficient.* A finding that an alien has a disability, as defined by Section 504 of the Rehabilitation Act, will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge.

(b) *Totality of the circumstances.* The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances. No one factor outlined in paragraph (a) of this section, other than the lack of a sufficient affidavit of support, if required, should be the sole criterion for determining if an alien is likely to become a public charge. DHS may periodically issue guidance to adjudicators to inform the totality of the circumstances assessment. Such guidance will consider how these factors affect the likelihood that the alien will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.

(c) *Denial Decision.* Every written denial decision issued by USCIS based on the totality of the circumstances set forth in paragraph (b) of this section will reflect consideration of each of the factors outlined in paragraph (a) of this section and specifically articulate the reasons for the officer's determination.

(d) *Receipt of public benefits while an alien is in an immigration category exempt from public charge inadmissibility.* In an adjudication for an immigration benefit for which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in § 212.23(a), or for which the alien received a waiver of public charge inadmissibility, as set forth in § 212.23(c).

(e) *Receipt of benefits available to refugees.* DHS will not consider any public benefits that were received by an alien who, while not a refugee admitted under section 207 of the Act, is eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the Act, including services described under section 412(d)(2) of the Act provided to an unaccompanied alien child as defined under 6 U.S.C. 279(g)(2).

§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.

(a) *Exemptions.* The public charge ground of inadmissibility under section 212(a)(4) of the Act does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreters, or Afghan or Iraqi nationals employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111–8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Public Law 110–181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or reregistering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(14) Nonimmigrants classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), 22 CFR 41.21(d);

(15) Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(16) Nonimmigrants classifiable as NATO–1, NATO–2, NATO–3, NATO–4 (NATO representatives), and NATO–6 in accordance with 22 CFR 41.21(d);

(17) Applicants for nonimmigrant status under section 101(a)(15)(T) of the Act, in accordance with 8 CFR 212.16(b);

(18) Except as provided in section 212.23(b), individuals who are seeking an immigration benefit for which admissibility is required, including but not limited to adjustment of status under section 245(a) of the Act and section 245(l) of the Act and who:

(i) Have a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the Act, or

(ii) Have been granted nonimmigrant status under section 101(a)(15)(T) of the Act, provided that the individual is in valid T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(19) Except as provided in § 212.23(b),

(i) Petitioners for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act; or

(ii) Individuals who are granted nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act, who are seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status under section 245(a) of the Act, provided that the individuals are in valid U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(20) Except as provided in paragraph (b) of this section, any aliens who are VAWA self-petitioners under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in section paragraph (b) of this section, qualified aliens described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983);

(25) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106–429 under 8 CFR 245.21;

(26) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991, under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note;

(27) Applicants adjusting status who qualify for a benefit under Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, 113 Stat. 1198, 2309 (December 20, 2019) (Liberian Refugee Immigration Fairness), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116–260 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension);

(28) Certain Syrian nationals adjusting status under Public Law 106–378; and

(29) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Limited Exemption.* Aliens described in § 212.23(a)(18) through (21) must submit an affidavit of support under section 213A of the INA if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

(c) *Waivers.* A waiver for the public charge ground of inadmissibility may be authorized based on statutory or regulatory authority, for the following categories of aliens:

(1) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(2) Nonimmigrants admitted under section 101(a)(15)(S) of the Act applying

for adjustment of status under section 245(j) of the Act (witnesses or informants); and

(3) Any other waiver of the public charge ground of inadmissibility that is authorized by law or regulation.

PART 245—ADJUSTMENT OF STATUS TO THAT OF A PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 4. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 5. In § 245.23, revise paragraph (c)(3) to read as follows:

§ 245.23 Adjustment of aliens in T nonimmigrant classification.

* * * * *

(c) * * *

(3) The alien is inadmissible under any applicable provisions of section 212(a) of the Act and has not obtained a waiver of inadmissibility in accordance with 8 CFR 212.18 or 214.11(j). Where the alien establishes that the victimization was a central reason for the applicant's unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the applicant need not obtain a waiver of that ground of inadmissibility. The alien, however, must submit with the Form I–485 evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. To qualify for this exception, the victimization need not be the sole reason for the unlawful presence but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.

* * * * *

Alejandro N. Mayorkas,

Secretary of Homeland Security.

[FR Doc. 2022–03788 Filed 2–18–22; 11:15 am]

BILLING CODE 9111–97–P

FEDERAL REGISTER

Vol. 87 Thursday,

No. 37 February 24, 2022

Part V

The President

Proclamation 10340—National Eating Disorders Awareness Week, 2022
Proclamation 10341—Day of Remembrance of Japanese American Incarceration During World War II
Notice of February 22, 2022—Continuation of the National Emergency With Respect to Libya

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

Presidential Documents

Title 3—

The President

Proclamation 10340 of February 18, 2022

National Eating Disorders Awareness Week, 2022

By the President of the United States of America

A Proclamation

National Eating Disorders Awareness Week provides an opportunity to draw attention to one of the most serious mental health conditions impacting the lives of Americans and their families today. Eating disorders—including binge-eating, bulimia nervosa, and anorexia nervosa—affect people of all backgrounds and genders. Nearly 1 in 10 Americans are expected to develop an eating disorder in their lifetime. In recent years, there has been a troubling surge in eating disorders among children, older adults, military service members, and transgender individuals. When undiagnosed or untreated, eating disorders can have serious—even fatal—consequences, which is why improving mental health services and support is so important.

The COVID–19 pandemic has been especially challenging for individuals with eating disorders. National eating disorder hotlines have seen a more than 70 percent spike in the volume of calls and chats since the pandemic started. Research shows that the number of hospitalizations for eating disorders has doubled during that same time period.

Despite the fact that eating disorders have among the highest mortality rate of any mental illness, the shame and stigmatization of eating disorders often prevent people who are suffering from seeking help. That is why it is important to make more people aware that, with early detection and medical intervention, full recovery from an eating disorder is possible.

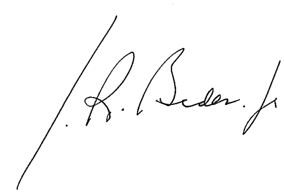
My Administration is working to improve access to treatment, recovery, and social support for everyone currently living with an eating disorder as well as for their caregivers, families, and friends. Through the National Institute of Mental Health, we are working to develop better therapies and interventions. My Administration is also working to ensure that eating disorder care and treatment are treated the same as any other medical conditions by health insurance plans. Funding from the Substance Abuse and Mental Health Services Administration (SAMHSA) provides health care providers, families, caregivers, and community members the tools, training, and resources to recognize the symptoms of an eating disorder so that referrals to specialty providers and treatment can be provided as early as possible.

We are also working to increase access to mental health services and support for young people, who are uniquely vulnerable to eating disorders. The American Rescue Plan included $122 billion to help schools reopen safely, enabling them to support the mental health of their students. I have also called for doubling the number of school-based health counselors, social workers, and nurses. Together, these resources will be essential to addressing the mental health needs of our Nation's youth.

To all those families who have watched a loved one face an eating disorder and to all those who are currently facing or recovering from an eating disorder—you are in our hearts and you are not alone. It is within our power to reduce the burden of eating disorders on the lives of Americans and their families. As we work toward these improvements, immediate assistance is available for those in need of help. The SAMHSA National Helpline at 1–800–662–4357 is a confidential, free, 24-hour-a-day, 365-days-a-year information and referral service. For anyone experiencing a crisis, immediate help is also available by calling the National Suicide Prevention Lifeline at 1–800–273–TALK.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim February 21 through February 27, 2022, as National Eating Disorders Awareness Week. I encourage citizens, government agencies, private businesses, nonprofit organizations, and other interested groups to join in activities that will increase awareness of what Americans can do to prevent eating disorders and improve access to care and other support services for those currently living with an eating disorder.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of February, in the year of our Lord two thousand twenty-two, and of the Independence of the United States of America the two hundred and forty-sixth.



[FR Doc. 2022–04096
Filed 2–23–22; 11:15 am]
Billing code 3395–F2–P

Presidential Documents

Proclamation 10341 of February 18, 2022

Day of Remembrance of Japanese American Incarceration During World War II

By the President of the United States of America

A Proclamation

Eighty years ago, on February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, stripping people of Japanese descent of their civil rights. That order and the subsequent actions carried out by the Federal Government represent one of the most shameful chapters in our Nation's history. On this Day of Remembrance of Japanese American Incarceration During World War II, we acknowledge the unjust incarceration of some 120,000 Japanese Americans, approximately two-thirds of whom were born in the United States.

Despite never being charged with a crime, and without due process, Japanese Americans were forcibly removed from their homes and communities and incarcerated, simply because of their heritage. For years, many Japanese Americans lived in harsh, overcrowded conditions, surrounded by barbed wire fences and armed guards. Not only did they lose their homes, businesses, property, and savings—they also lost their liberty, security, and the fundamental freedoms that belong to all Americans in equal measure.

I have always believed that great nations do not ignore their most painful moments—they confront them with honesty and, in doing so, learn from them and grow stronger as a result. The incarceration of Japanese Americans 80 years ago is a reminder to us today of the tragic consequences we invite when we allow racism, fear, and xenophobia to fester.

Today, we reaffirm the Federal Government's formal apology to Japanese Americans whose lives were irreparably harmed during this dark period of our history, and we solemnly reflect on our collective moral responsibility to ensure that our Nation never again engages in such un-American acts. We acknowledge the intergenerational trauma and loss that the incarceration of Japanese Americans has caused. We also uplift the courage and resilience of brave Japanese Americans who, despite being unjustly incarcerated, formed powerful communities and marshalled incredible dignity and strength.

Many of those whose families were incarcerated volunteered or were drafted to serve in combat—courageously serving in the 100th Infantry Battalion, Military Intelligence Service, Women's Army Auxiliary Corps, Army Nurse Corps, and the 442nd Regimental Combat Team with unwavering patriotism. The all-Japanese American 100th Infantry Battalion and the 442nd Regimental Combat Team became two of the most decorated and distinguished military units in our Nation's history. Countless Japanese Americans carry forward this legacy of extraordinary service today, and their work to preserve the history of this period strengthens our Nation and our democracy.

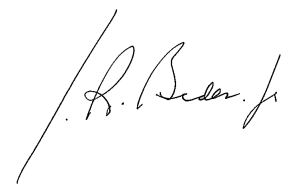
We reflect on the bravery of civil rights leaders like Fred Korematsu, Minoru Yasui, Gordon Hirabayashi, and Mitsuye Endo, and that of every Japanese American who organized and sought redress. Their efforts helped bring about the first Day of Remembrance, led President Jimmy Carter to sign the law creating the Commission on Wartime Relocation and Internment of Civilians, and spurred President Ronald Reagan to sign the Civil Liberties Act of 1988, which provided monetary reparations to living survivors and an official apology to the Japanese American community. At the same time, we also acknowledge the painful reality that Japanese Latin Americans, who were taken from their Central and South American homes and incarcerated by the United States Government during World War II, were excluded from the Civil Liberties Act of 1988.

Today, the National Park Service helps preserve several Japanese American incarceration camps. These tangible reminders of our history provide important spaces for reflection and learning about the injustices born of prejudice. Preserving incarceration sites as national parks and historic landmarks is proof of our Nation's commitment to facing the wrongs of our past, to healing the pain still felt by survivors and their descendants, and to ensuring that we always remember why it matters that we never stop fighting for equality and justice for all. My Administration is committed to maintaining these national parks and landmarks for future generations and to combating xenophobia, hate, and intolerance—including through the reestablished White House Initiative on Asian Americans, Native Hawaiians, and Pacific Islanders. In the words of Dr. Frank Kitamoto, who was incarcerated as a child, ''This is not just a Japanese American story but an American story with implications for the world.''

The words we use to describe the historical and present treatment of communities of color and other underserved communities have profound meaning. Today, we recognize that euphemistic terms that we have collectively used in the past—such as ''assembly centers,'' ''relocation,'' or ''internment''—do not adequately describe the injustice experienced by some 120,000 people; we recognize the forced removal and mass incarceration of Japanese Americans and others during World War II; and we reaffirm our commitment to *Nidoto Nai Yoni,* which translates to ''Let It Not Happen Again.''

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim February 19, 2022, as a Day of Remembrance of Japanese American Incarceration During World War II. I call upon the people of the United States to commemorate this injustice against civil liberties and civil rights during World War II; to honor the sacrifice of those who defended the democratic ideals of this Nation; and to commit together to eradicate systemic racism to heal generational trauma in our communities.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of February, in the year of our Lord two thousand twenty-two, and of the Independence of the United States of America the two hundred and forty-sixth.



[FR Doc. 2022–04103
Filed 2–23–22; 11:15 am]
Billing code 3395–F2–P

Presidential Documents

Notice of February 22, 2022

Continuation of the National Emergency With Respect to Libya

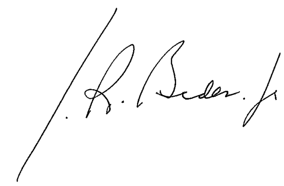
On February 25, 2011, by Executive Order 13566, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions of Colonel Muammar Qadhafi, his government, and close associates, which took extreme measures against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians. In addition, there was a serious risk that Libyan state assets would be misappropriated by Qadhafi, members of his government, members of his family, or his close associates if those assets were not protected. The foregoing circumstances, the prolonged attacks, and the increased numbers of Libyans seeking refuge in other countries from the attacks caused a deterioration in the security of Libya and posed a serious risk to its stability.

On April 19, 2016, the President signed Executive Order 13726, which expanded the scope of the national emergency declared in Executive Order 13566. The President found that the ongoing violence in Libya, including attacks by armed groups against Libyan state facilities, foreign missions in Libya, and critical infrastructure, as well as human rights abuses, violations of the arms embargo imposed by United Nations Security Council Resolution 1970 (2011), and misappropriation of Libya's natural resources threaten the peace, security, stability, sovereignty, democratic transition, and territorial integrity of Libya, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

The situation in Libya continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, and measures are needed to protect against the diversion of assets or other abuses by members of Qadhafi's family, their associates, and other persons hindering Libyan national reconciliation.

For this reason, the national emergency declared on February 25, 2011, and expanded on April 19, 2016, must continue in effect beyond February 25, 2022. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13566.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 22, 2022.

[FR Doc. 2022–04104
Filed 2–23–22; 11:15 am]
Billing code 3395–F2–P

FEDERAL REGISTER

Vol. 87 Thursday,

No. 37 February 24, 2022

Part VI

The President

Notice of February 23, 2022—Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

Federal Register
Vol. 87, No. 37
Thursday, February 24, 2022

Presidential Documents

Title 3—

The President

Notice of February 23, 2022

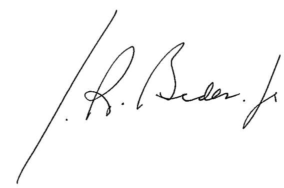
Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

On March 1, 1996, by Proclamation 6867, a national emergency was declared to address the disturbance or threatened disturbance of international relations caused by the February 24, 1996, destruction by the Cuban government of two unarmed, United States-registered civilian aircraft in international airspace north of Cuba. On February 26, 2004, by Proclamation 7757, the national emergency was expanded to deny monetary and material support to the Cuban government. On February 24, 2016, by Proclamation 9398, and on February 22, 2018, by Proclamation 9699, the national emergency was further modified based on continued disturbances or threatened disturbances of the international relations of the United States related to Cuba. The Cuban government has not demonstrated that it will refrain from the use of excessive force against United States vessels or aircraft that may engage in memorial activities or peaceful protest north of Cuba.

Further, the unauthorized entry of any United States-registered vessel into Cuban territorial waters continues to be detrimental to the foreign policy of the United States because such entry could facilitate a mass migration from Cuba. It continues to be United States policy that a mass migration from Cuba would endanger United States national security by posing a disturbance or threatened disturbance of the international relations of the United States.

Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Cuba and the emergency authority relating to the regulation of the anchorage and movement of vessels set out in Proclamation 6867, as amended by Proclamation 7757, Proclamation 9398, and Proclamation 9699.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 23, 2022.

[FR Doc. 2022–04144
Filed 2–23–22; 11:15 am]
Billing code 3395–F2–P

Reader Aids

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, FEBRUARY

CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *https://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available at *https://www.govinfo.gov*. Some laws may not yet be available.

S. 566/P.L. 117–87
To designate the facility of the United States Postal Service located at 42 Main Street in Slatersville, Rhode Island, as the "Specialist Matthew R. Turcotte Post Office". (Feb. 22, 2022; 136 Stat. 19)

S. 583/P.L. 117–88
Promoting Rigorous and Innovative Cost Efficiencies for Federal Procurement and Acquisitions Act of 2021 (Feb. 22, 2022; 136 Stat. 20)

Last List February 22, 2022

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://listserv.gsa.gov/cgi-bin/wa.exe?SUBED1=PUBLAWS-L&A=1*

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.